SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 59

DONALD LOFTUS, PETITIONER,

vs.

PEOPLE OF THE STATE OF ILLINOIS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

INDEX

	Original	Print
Proceedings in Supreme Court of Illinois	a	1
Caption (omitted in printing)	a	
Record from Circuit Court of McHenry County	1	1
Caption (omitted in printing)	1	
Recall of grand jury (omitted in printing)	2	
Return of indictment (omitted in printing)	2	
Indictment (No. 25503)	4	1
Capias (omitted in printing)	9	
Proceedingss of April 9, 1932	10	4
Order fixing bail	11	4
Arraignment	11	4
Counsel appointed	11	4
Plea of not guilty entered	11	4
Case continued	11	4
Proceedings of April 18, 1932	12	4
Continuance denied	13	5
Motion to quash indictment denied	13	5
Jury called	13	5
Motion for time to get witnesses	14	7
Verdict	14	7
Motion for new trial	15	7
Proceedings of April 22, 1932	16	7
Motion for new trial overruled	17	7
Motion in arrest of judgment overruled	17	7
Judgment on verdict	17	8

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 2, 1948.

—5120

Record from Circuit Court of McHenry County—Continued		Original	Print
Clerk's certificate	(omitted in printing)	19	
Caption	(omitted in printing)	20	
Recall of grand jury	(omitted in printing)	21	
Return of indictment	(omitted in printing)	21	
Indictment (No. 25505)		23	9
Capias	(omitted in printing)	28	
Proceedings of April 9, 1932		29	12
Order fixing bail		30	12
Arraignment		30	12
Counsel appointed		30	12
Plea of not guilty entered		30	12
Case continued		30	12
Proceedings of April 18, 1932		31	12
Jury called		32	13
Proceedings of April 19, 1932		33	13
Telegram stating counsel cannot appear		34	14
Other counsel appointed		34	14
Jury empaneled		34	14
Verdict		35	15
Motion for new trial		36	15
Proceedings of April 22, 1932		37	15
Motion for new trial overruled		38	15
Motion in arrest of judgment overruled		38	15
Judgment on verdict		38	16
Clerk's certificate	(omitted in printing)	40	
Caption	(omitted in printing)	41	
Recall of grand jury	(omitted in printing)	42	
Return of indictment	(omitted in printing)	42	
Indictment (No. 25506)		44	17
Capias	(omitted in printing)	47	
Proceedings of April 9, 1932		48	18
Order fixing bail		49	19
Arraignment		49	19
Counsel appointed		49	19
Plea of not guilty entered		49	19
Case continued		49	19
Proceedings of April 19, 1932		50	19
Jury called		51	20
Order excusing counsel from further service		51	20
Jury empaneled		51	20
Verdict		52	21
Motion for new trial		53	21
Proceedings of April 22, 1932		54	21
Motion for new trial overruled		55	21
Motion in arrest of judgment overruled		55	21
Judgment on verdict		55	22
Clerk's certificate	(omitted in printing)	57	
Caption	(omitted in printing)	58	
Recall of grand jury	(omitted in printing)	59	
Return of indictment	(omitted in printing)	59	

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	Original	Print
Record from Circuit Court of McHenry County—Continued		
Indictment (No. 25504)	61	23
Capias (omitted in printing)	64	
Proceedings of April 9, 1932	65	24
Order fixing bond	66	25
Arraignment	66	25
Counsel appointed	66	25
Plea of not guilty entered	66	25
Case continued	66	25
Proceedings of April 19, 1932	67	25
Jury called	68	26
Court declines to appoint counsel	68	26
Jury empaneled	68	26
Verdict	69	27
Motion for new trial	69	27
Proceedings of April 22, 1932	70	27
Motion for new trial overruled	71	27
Motion in arrest of judgment overruled	71	27
Judgment on verdict	71	27
Clerk's certificate (omitted in printing)	73	
Abstract of record	76	29
Assignments of error	84	35
Minute entry of argument and submission	85	35
Opinion, Stone, J.	87	36
Judgment	92	41
Petition for rehearing	94	41
Order denying rehearing	106	49
Clerk's certificate (omitted in printing)	107	
Order granting certiorari	108	50

[fols. a-1-3] [Caption omitted]

[fol. 4]

IN THE CIRCUIT COURT OF MC HENRY COUNTY

PEOPLE OF THE STATE OF ILLINOIS

VS.

DONALD LOFTUS, Alias David Loftus, Alias Dave Loftus, Alias Dan Foreman, Alias Richard Hollister, Alias George Willis, Alias Harold Gallagher

INDICTMENT FOR ROBBERY WITH A GUN—Filed April 9, 1932

1. The Grand Jurors chosen, selected and sworn, in and for the County of McHenry, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present: That Donald Loftus Alias David Loftus Alias Dave Loftus Alias Dan Foreman Alias Richard Hollister Alias George Willis Alias Harold Gallagher, late of the County of McHenry and State of Illinois, on to-wit: the 26th day of November, in the year of our Lord, one thousand nine hundred and thirty, at and within the said County of McHenry, in the State of Illinois aforesaid, in and upon one Harold Fiertag, feloniously did make an assault, the said Donald Loftus Alias David Loftus Alias Dave Loftus Alias Dan Foreman Alias Richard Hollister Alias George Willis Alias Harold Gallagher, being then and there armed with deadly weapons, to-wit: pistols, being then and there loaded with gun powder and leaden bullets, and the said Harold Fiertag, in bodily fear and danger of his life, then and there feloniously did put, and divers United States treasury notes, National Bank bills, gold certificates and silver certificates, the exact denominations [fol. 5] of which to the Grand Jurors are unknown, all legal tender of the United States and good and lawful money thereof, of the value of to-wit: Twelve thousand, one hundred fifty ($12,150) dollars, of the goods and chattels of the First National Bank of Marengo, Illinois, a Banking Corporation, organized under and operating by virtue of the Federal Laws of the United States, then and there being in his care, custody and control and against the will of the said Harold Fiertag, then and there feloniously did rob,

steal, take and carry away, contrary to the form of the statute in such case made and provided and against the peace and dignity of the People of the State of Illinois.

2. And the Grand Jurors chosen, selected and sworn, in and for the County of McHenry aforesaid, in the name and by the authority of the People of the State of Illinois aforesaid, upon their oaths aforesaid, do further present: That the said Donald Loftus Alias David Loftus Alias Dave Loftus Alias Dan Foreman Alias Richard Hollister Alias George Willis Alias Harold Gallagher, late of the County and State aforesaid, on to-wit: the 26th day of November, in the year of our Lord, one thousand nine hundred and thirty, at and within the said County of McHenry, in the State of Illinois aforesaid, in and upon one Harold Fiertag, feloniously did make an assault, the said Donald Loftus Alias David Loftus Alias Dave Loftus Alias Dan Foreman Alias Richard Hollister Alias George Willis Alias Harold Gallagher, being then and there armed with deadly weapon, to-wit: pistols, being then and there loaded with gun powder and leaden bullets, and the said Harold Fiertag, in bodily fear and danger of his life, then and there feloniously did put, and divers sums of money, divers United States treasury notes and National Bank bills, all good and lawful money of the United States and legal tender, of the value of to-wit: Twelve thousand, one hundred fifty ($12,150) dollars, of the goods and chattels of the First National Bank [fol. 6] of Marengo, a Banking Corporation organized under and operating by virtue of the Federal Laws of the United States, and being then and there in the custody and under the control of the said Harold Fiertag, an employee of the said First National Bank of Marengo, a Banking Corporation, from the person and from the custody and control and against the will of the said Harold Fiertag, feloniously and violently, did rob, steal, take and carry away, contrary to the form of the statute in such case made and provided and against the peace and dignity of the same People of the State of Illinois.

3. And the Grand Jurors chosen, selected and sworn in and for the County of McHenry aforesaid, in the name and by the authority of the People of the State of Illinois aforesaid, upon their oaths aforesaid, do further present: That Donald Loftus Alias David Loftus Alias Dave Loftus Alias Dan Foreman Alias Richard Hollister Alias George Willis

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Alias Harold Gallagher, late of the County of McHenry and State of Illinois, on to-wit: the 26th day of November, in the year of our Lord, one thousand nine hundred and thirty, at and within the said County of McHenry, in the State of Illinois aforesaid, in and upon one Laura Renwick, feloniously did make an assault, the said Donald Loftus Alias David Loftus Alias Dave Loftus Alias Dan Foreman Alias Richard Hollister Alias George Willis Alias Harold Gallagher, being then and there armed with deadly weapons, to-wit: pistols, being then and there loaded with gun powder and leaden bullets, and the said Laura Renwick, in bodily fear and danger of her life, then and there feloniously did put, and divers United States treasury notes, National Bank bills, gold certificates and silver certificates, the exact denominations of which to the Grand Jurors are unknown, all legal tender of the United States and good and lawful money thereof, of the value of to-wit: Twelve thousand, one hundred fifty ($12,150) dollars, of the goods and chattels of the First National Bank of [fol. 7] Marengo, Illinois, a Banking Corporation, organized under and operating by virtue of the Federal laws of the United States, then and there being in her care, custody and control and against the will of the said Laura Renwick, then and there feloniously did rob, steal, take and carry away, contrary to the form of the statute in such case made and provided and against the peace and dignity of the People of the State of Illinois.

4. And the Grand Jurors chosen, selected and sworn, in and for the County of McHenry aforesaid, in the name and by the authority of the People of the State of Illinois aforesaid, upon their oaths aforesaid, do further present: That the said Donald Loftus Alias David Loftus Alias Dave Loftus Alias Dan Foreman Alias Richard Hollister Alias George Willis Alias Harold Gallagher, late of the County and State aforesaid, on to-wit: the 26th day of November, in the year of our Lord, one thousand nine hundred and thirty, at and within the said County of McHenry, in the State of Illinois aforesaid, in and upon one Laura Renwick, feloniously did make an assault, the said Donald Loftus Alias David Loftus Alias Dave Loftus Alias Dan Foreman Alias Richard Hollister Alias George Willis Alias Harold Gallagher, being then and there armed with deadly weapons, to-wit: pistols, being then and there loaded with gun powder and leaden

bullets, and the said Laura Renwick, in bodily fear and danger of her life, then and there feloniously did put, and divers sums of money, divers United States treasury notes and National Bank bills, all good and lawful money of the United States and legal tender of the value of to-wit: Twelve Thousand, one hundred fifty ($12,150) Dollars, of the goods and chattels of the First National Bank of Marengo, a Banking Corporation organized under and operating by virtue of the Federal Laws of the United States, and being then and there in the custody and under the control of the [fols. 8-10] said Laura Renwick, an employee of the said First National Bank of Marengo, a banking Corporation, from the person and from the custody and control and against the will of the said Laura Renwick, feloniously and violently did rob, steal, take and carry away, contrary to the form of the statute in such case made and provided and against the peace and dignity of the same People of the State of Illinois.

Vincent S. Lumley, State's Attorney in and for McHenry County, Illinois.

Upon the back of the same appear the following endorsements:

Gen. No. 25503. Term No. —. McHenry County Circuit Court, Jan. Term, A. D. 1932. The People vs. Donald Loftus Alias David Loftus Alias Dave Loftus Alias Dan Foreman Alias Richard Hollister Alias George Willis Alias Harold Gallagher. Indictment for Robbery with a Gun. A True Bill. Frank C. Ferris, Foreman of the Grand Jury. Witnesses: Harold Fiertag, Laura Renwick, Lester Edinger, Harold Reese, Richard Patrick. Vincent S. Lumley, States Attorney. 33/436. Capias Ordered and Bail Fixed at $25000. Edward D. Shurtleff, Judge.

[fols. 11-12] In Circuit Court of McHenry County

Minute Entries—April 9, 1932

It appearing to the Court that the Grand Jury has returned an Indictment against the defendant herein it is ordered that a Capias Forthwith issue herein against the said defendant and that the said defendant's bail on said Capias be and it is hereby fixed at the sum of Twenty-five Thousand ($25,000.00) Dollars.

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Now on this day come The People of the State of Illinois by Vincent S. Lumley, State's Attorney and the defendant, Donald Loftus alias David Loftus alias Dave Loftus alias Dan Foreman alias Richard Hollister alias George Willis alias Harold Gallagher in his own proper person also comes and the said defendant having been furnished with a copy of the Indictment and with lists of the witnesses and Grand and Petit Jurors for this Term of Court, it is therefore ordered that said defendant be arraigned for plea.

Whereupon comes the said defendant and states to the Court that he has no counsel and that his money is tied up and asks the Court for a week's continuance in order to get the proper counsel, Attorney W. W. Ryan, he at present being busy in Chicago.

Whereupon it is ordered by the Court that David R. Joslyn, Jr., be and he is hereby appointed temporary counsel to make motions in behalf of said defendant. And after conferring with David R. Joslyn, Jr., his counsel, again comes the said defendant and enters a temporary plea of not guilty of Robbery with a Gun in manner and form as charged in said indictment, until he has time to confer with his attorney, W. W. Ryan.

It is therefore ordered by the Court that said plea of not guilty be and same is hereby entered of record.

It is further ordered by the Court that this case be and the same is hereby continued until Monday April 18th, 1932 and this case to be first case tried.

[fol. 13] MINUTE ENTRIES—April 18, 1932

Now on this day come The People of the State of Illinois by Vincent S. Lumley, State's Attorney. Also on this day comes David H. Feldman and enters his appearance in this cause as counsel for the defendant Donald Loftus alias David Loftus alias Dave Loftus alias Dan Foreman alias Richard Hollister alias George Willis alias Harold Gallagher.

Again on this day come the said People of the State of Illinois by Vincent S. Lumley, State's Attorney and the defendant in his own proper person as well as by David H. Feldman, his counsel, also comes.

Whereupon comes David H. Feldman, counsel for said defendant, and moves the Court for a continuance which motion is denied by the Court.

Whereupon comes David H. Feldman, counsel for said defendant and moves the Court to quash the Indictment in this case and after arguments of counsel and due deliberation by the Court, said motion is denied.

And this case now being called for trial; it is ordered that a Jury be called.

It is further ordered by the Court that Maurice T. Johnson be and he is hereby appointed to assist David H. Feldman, defendant's counsel, in selecting the jury and trying the case.

It appearing to the Court that the January Term panel of Petit Jurors has been exhausted it is ordered by the Court that the Sheriff draw from the body of the county a sufficient number of men to fill the jury box. Whereupon the Sheriff summoned the following named persons to serve as Petit Jurors: P. Ben Anderson, John Shannon, Earl Brown, Gust Larson, Al Klemme, Claude Westerman, Elmer [fol. 14] Miner and Lee Jacobs.

It is ordered by the Court that Juryman Emil Kellerman be dismissed and be deprived of Jury fees until the further order of Court on the grounds that he tried to evade serving as a Juryman.

And the defendant having had 17 Peremptory Challenges and 3 excused for Cause;

Whereupon come the following jurors, to-wit: Simon Michels, A. L. Bennett, Frank Henry, Harry Holmes, Carl Kublank, Richard Anderson, Oscar Strom, Clarence Niessen, Al Klemme, Elmer Miner, Lee Jacobs and Gust Larson, twelve good and lawful men who were duly sworn and empanneled according to law to try the issues herein.

Whereupon examination of witnesses by counsel is commenced and now at the close of Plaintiff's case comes the defendant by his counsel and enters his motion for time to get witnesses. Whereupon the Court allows defendant's counsel ten minutes to confer with defendant as to witnesses.

And now the Court and jury having heard all the proofs herein submitted, the testimony of witnesses produced and sworn in open Court and arguments of counsel being waived, by agreement of counsel this case is to be submitted to the Jury without arguments. And now the Jury having heard

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the instructions of the court, retire in charge of a sworn bailiff to consider of their Verdict.

And afterwards on this day come the Jury and return into open Court with their Verdict, which Verdict is in the words and figures following, to-wit:

VERDICT NUMBER ONE

We, the jury, find the defendant David Loftus guilty of robbery in manner and form as charged in the indictment, and we further find that at the time of the commission of the robbery, the said defendant David Loftus was then [fols. 15-16] armed with a dangerous weapon, to-wit: a pistol, and we further find from the evidence that the defendant David Loftus is about the age of 34 years.

A. L. Bennett, Foreman; Elmer C. Miner, Oscar Strom, Alfred H. Klemme, Lee W. Jacobs, Clarence Niesen, Gus Larson, Harry Holmes, Frank Henry, R. B. Anderson, Carl G. Kublank, Simon Michels.

Whereupon comes the defendant by David H. Feldman, his counsel, and enters his motion for a new trial.

[fol. 17] MINUTE ENTRIES—April 22, 1932

Now on this day this cause coming on for hearing on defendant's motion for a new trial heretofore entered herein, come The People of the State of Illinois by Vincent S. Lumley, State's Attorney and the defendant Donald Loftus alias David Loftus alias Dave Loftus alias Dan Foreman alias Richard Hollister alias George Willis alias Harold Gallagher in his own proper person as well as by David H. Feldman, his counsel, also comes. And now the Court having heard and duly considered the arguments of counsel and being fully advised in the premises, overrules said motion.

Thereupon comes the defendant by David H. Feldman his counsel and enters his motion in arrest of judgment and the Court having heard and duly considered the arguments of counsel and being fully advised in the premises, overrules said motion.

It is further ordered by the Court that leave be and is hereby given to file a bill of exceptions herein.

It is therefore ordered by the Court that judgment enter herein on the verdict of the jury finding the defendant guilty as charged in the indictment.

JUDGMENT

This day come the said People by Vincent S. Lumley, State's Attorney and the Defendant Donald Loftus alias David Loftus alias Dave Loftus alias Dan Foreman alias Richard Hollister alias George Willis alias Harold Gallagher as well in his own proper person as by David H. Feldman, his counsel, also comes, and now neither the said Defendant nor his counsel for him saying anything further why the judgment of the Court should not now be pronounced against him on the Verdict of guilty, heretofore rendered to the indictment in this cause.

Therefore, it is ordered and adjudged by the Court that the said Defendant Donald Loftus alias David Loftus alias [fols. 18-22] Dave Loftus alias Dan Foreman alias Richard Hollister alias George Willis alias Harold Gallagher who is found to be 34 years of age, and is convicted of the crime of Robbery With a Gun herein, be sentenced to the Penitentiary of this State, at Joliet, Illinois, and it is further ordered and adjudged that the said Defendant Donald Loftus alias David Loftus alias Dave Loftus alias Dan Foreman alias Richard Hollister alias George Willis alias Harold Gallagher be taken from the bar of this Court to the Common Jail of McHenry County and from thence by the Sheriff of McHenry County within ten days to the Penitentiary of this State, at Joliet, and be delivered to the Warden or Keeper of said Penitentiary; and the said Warden or Keeper is hereby required and commanded to take the body of the said Defendant Donald Loftus alias David Loftus alias Dave Loftus alias Dan Foreman alias Richard Hollister alias George Willis alias Harold Gallagher and confine him in said Penitentiary, in safe and secure custody, from and after the delivery thereof until discharged by due course of law, to-wit: from one year to life, the term of such imprisonment and commitment may be terminated earlier than the maximum by the Department of Public Welfare, by and with the approval of the Governor in the nature of a release or commutation of sentence or commitment.

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It is further ordered that the said Defendant pay all the costs of these proceedings, and that execution issue therefor.

It is further ordered by the Court that Sixty Days be allowed in which to file Bill of Exceptions.

[fol. 23] IN THE CIRCUIT COURT OF MC HENRY COUNTY

PEOPLE OF THE STATE OF ILLINOIS,

vs.

DONALD LOFTUS, Alias David Loftus, Alias Dave Loftus, Alias Dan Foreman, Alias Richard Hollister, Alias George Willis, Alias Harold Gallagher

INDICTMENT FOR ROBBERY WITH A GUN—Filed April 9, 1932

1. The Grand Jurors chosen, selected and sworn, in and for the County of McHenry in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present: That Donald Loftus Alias David Loftus Alias Dave Loftus Alias Dan Foreman Alias Richard Hollister Alias George Willis Alias Harold Gallagher, late of the County of McHenry and State of Illinois, on to-wit: the 19th day of September, in the year of our Lord, one thousand nine hundred and thirty, at and within the said County of McHenry, in the State of Illinois aforesaid, in and upon one George Keyes feloniously did make an assault, the said Donald Loftus Alias David Loftus Alias Dave Loftus Alias Dan Foreman Alias Richard Hollister Alias George Willis Alias Harold Gallagher, being then and there armed with deadly weapons, to-wit: pistols, then and there being loaded with gun powder and leaden bullets, and the said George Keyes in bodily fear and danger of his life, then and there feloniously did put, and divers United States treasury notes, National Bank bills, [fol. 24] gold certificates and silver certificates, the exact denominations of which are to the Grand Jurors unknown, all legal tender of the United States and good and lawful money thereof, of the value of to-wit: Twenty-eight hundred sixty-nine ($2869) dollars, of the goods and chattels of the Algonquin State Bank, an Illinois Banking Corporation, then and there being in his care, custody and control, and against the will of the said George Keyes, then and there

feloniously and violently did rob, steal, take and carry away, contrary to the form of the statute in such case made and provided and against the peace and dignity of the People of the State of Illinois.

2. And the Grand Jurors chosen, selected and sworn in and for the County of McHenry aforesaid, in the name and by the authority of the People of the State of Illinois aforesaid, upon their oaths aforesaid, do further present: That the said Donald Loftus Alias David Loftus Alias Dave Loftus Alias Dan Foreman Alias Richard Hollister Alias George Willis Alias Harold Gallagher, on to-wit: the 19th day of September, in the year of our Lord, one thousand nine hundred and thirty, at and within the said County of McHenry, in the State of Illinois aforesaid, in and upon one George Keyes, feloniously did make an assault, the said Donald Loftus Alias David Loftus Alias Dave Loftus Alias Dan Foreman Alias Richard Hollister Alias George Willis Alias Harold Gallagher, being then and there armed with deadly weapons, to-wit: pistols, being then and there loaded with gun powder and leaden bullets, and the said George Keyes in bodily fear and danger of his life, then and there feloniously did put, and divers sums of money, divers United States treasury notes and National Bank bills, all good and lawful money of the United States and legal tender, of the value of to-wit: Twenty-eight hundred sixty-nine ($2869) dollars, of the goods and chattels of the Algon- [fol. 25] quin State Bank of Algonquin, Illinois, a banking corporation organized under and operating by virtue of the laws of the State of Illinois, and being then and there in the custody and under the control of said George Keyes, the cashier of said Algonquin State Bank, a Banking Corporation, from the person and from the custody and control and against the will of the said George Keyes, feloniously and violently did rob, steal, take and carry away, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same People of the State of Illinois.

3. And the Grand Jurors chosen, selected and sworn in and for the County of McHenry aforesaid, in the name and by the authority of the People of the State of Illinois aforesaid, upon their oaths aforesaid, do further present: That Donald Loftus Alias David Loftus Alias Dave Loftus Alias Dan Foreman Alias Richard Hollister Alias George Willis

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Alias Harold Gallagher, late of the County of McHenry and State of Illinois, on to-wit: the 19th day of September, in the year of our Lord, one thousand nine hundred and thirty, at and within the said County of McHenry, in the State of Illinois aforesaid, in and upon one Wilbur Brewer feloniously did make an assault, said Donald Loftus Alias David Loftus Alias Dave Loftus Alias Dan Foreman Alias Richard Hollister Alias George Willis Alias Harold Gallagher, being then and there armed with deadly weapons, to-wit: pistols, being then and there loaded with gun powder and leaden bullets, and the said Wilbur Brewer, in bodily fear and danger of his life, then and there feloniously did put, and divers United States treasury notes, National Bank bills, gold certificates and silver certificates, the exact denominations of which are to the Grand Jurors unknown, all legal tender of the United States and good and lawful money thereof, of the value of to-wit: Twenty-eight hundred [fol. 26] sixty-nine ($2869) dollars, of the goods and chattels of the Algonquin State Bank, an Illinois Banking Corporation, located at Algonquin, Illinois, then and there being in his care, custody and control and against the will of the said Wilbur Brewer, then and there feloniously did rob, steal, take and carry away, contrary to the form of the statute in such case made and provided and against the peace and dignity of the People of the State of Illinois.

4. And the Grand Jurors chosen, selected and sworn, in and for the County of McHenry aforesaid, in the name and by the authority of the People of the State of Illinois aforesaid, upon their oaths aforesaid, do further present: That the said Donald Loftus Alias David Loftus Alias Dave LoftusAlias Dan Foreman Alias Richard Hollister Alias George Willis Alias Harold Gallagher, late of the County and State aforesaid, on to-wit: the 19th day of September, in the year of our Lord, one thousand nine hundred and thirty, at and within the said County of McHenry in the State of Illinois aforesaid, in and upon one Wilbur Brewer, feloniously did make an assault, the said Donald Loftus Alias David Loftus Alias Dave Loftus Alias Dan Foreman Alias Richard Hollister Alias George Willis Alias Harold Gallagher, being then and there armed with deadly weapons, to-wit: pistols, being then and there loaded with gun powder and leaden bullets, and the said Wilbur Brewer, in bodily fear and danger of his life, then and there feloniously did

put, and divers sums of money, divers United States treasury notes, divers National Bank bills, all good and lawful money of the United States and legal tender, of the value of to-wit: Twenty-eight hundred sixty-nine ($2869) dollars, of the goods and chattels of the Algonquin State Bank, organized under and operating by virtue of the laws of the [fols. 27-29] State of Illinois, and being then and there in the custody and under the control of the said Wilbur Brewer, the assistant cashier, an employee of the said Algonquin State Bank, a banking corporation, from the person and from the custody and control, and against the will of the said Wilbur Brewer, feloniously did rob, steal, take and carry away, contrary to the form of the statute in such case made and provided and against the peace and dignity of the People of the State of Illinois.

Vincent S. Lumley, State's Attorney in and for McHenry County, Illinois.

Upon the back of the same appear the following endorsements: Gen. No. 25505. Term No. —. McHenry County Circuit Court, Jan. Term A.D. 1932. The People vs. Donald Loftus Alias David Loftus Alias Dave Loftus Alias Dan Foreman Alias Richard Hollister, Alias George Willis Alias Harold Gallagher. Indictment for Robbery with a Gun. A True Bill. Frank C. Ferris, Foreman of the Grand Jury. Witnesses: George Keyes, Wilbur Brewer, Lester Edinger, Harold Reese, Gertrude Camm. Vincent S. Lumley, States Attorney. 33/438. Capias ordered and bail fixed at $25,000. Edward D. Shurtleff, Judge.

[fols. 30-31] Minute Entries—April 9, 1932

It appearing to the Court that the Grand Jury has returned an Indictment against the defendant herein it is ordered that a Capias Forthwith issue herein against the said defendant and that the said defendant's bail on said Capias be and it is hereby fixed at the sum of Twenty-five thousand ($25,000.00) Dollars.

Now on this day come The People of the State of Illinois by Vincent S. Lumley, State's Attorney and the defendant, Donald Loftus alias David Loftus alias Dave Loftus alias Dan Foreman alias Richard Hollister alias George Willis alias Harold Gallagher in his own proper person also comes

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and the said defendant having been furnished with a copy of the Indictment and with lists of the witnesses and Grand and Petit Jurors for this Term of Court, it is therefore ordered that said defendant be arraigned for plea.

Whereupon comes the said defendant and states to the Court that he has no counsel and that his money is tied up and asks the Court for a week's continuance in order to get the proper counsel, Attorney W. W. Ryan, he at present being busy in Chicago.

Whereupon it is ordered by the Court that David R. Joslyn, Jr. be and he is hereby appointed temporary counsel to make motions on behalf of said defendant. And after conferring with David R. Joslyn, Jr., his counsel, again comes the said defendant and enters a temporary plea of not guilty of Robbery with a Gun in manner and form as charged in said indictment, until he has time to confer with his attorney, W. W. Ryan.

It is therefore ordered by the Court that said plea of not guilty be and same is hereby entered of record.

It is further ordered by the Court that this case be and the same is hereby continued until Monday April 18th, 1932.

[fols. 32-33] Minute Entries—April 18, 1932

Now on this day come The People of the State of Illinois by Vincent S. Lumley, State's Attorney. Also on this day comes David H. Feldman and enters his appearance in this cause as counsel for the defendant Donald Loftus alias David Loftus alias Dave Loftus alias Dan Foreman alias Richard Hollister alias George Willis alias Harold Gallagher.

Again on this day come the said People of the State of Illinois by Vincent S. Lumley, State's Attorney and the defendant in his own proper person as well as by David H. Feldman, his counsel, also comes, with Attorney Maurice T. Johnson assisting.

And this case now being called for trial; it is ordered that a Jury be called. And the Jury Box being filled and said jurors being sworn to answer questions, it is ordered by the Court that said jurors be excused until ten o'clock A.M. Tuesday April 19th, 1932.

[fol. 34] MINUTE ENTRIES—April 19, 1932

Now on this day this cause coming on for further hearing come The People of the State of Illinois by Vincent S. Lumley, State's Attorney and the defendant Donald Loftus, alias David Loftus, alias Dave Loftus, alias Dan Foreman, alias Richard Hollister, alias George Willis, alias Harold Gallagher appearing in Court in person and David H. Feldman, his counsel, not being present and not appearing. (A Telegram from said David H. Feldman to Vincent S. Lumley, State's Attorney being filed in this cause and is in words and figures as follows, to-wit:

Western Union

Received at 2-7 Chicago, Ills., 948 AM 19 Woodstock, Ill. States Atty. Lumley Court House, Woodstock, Ills.

Cannot appear in court today for Loftus.

-David H. Feldman.)

It is therefore ordered by the Court that Maurice T. Johnson be and he is hereby appointed by the Court to defend the defendant.

And the said Defendant having had 7 Peremptory Challenges and 8 excused for Cause;

Whereupon come the following jurors, to-wit: Peter Wirfs, P. Ben Anderson, Clyde Hayford, Rupert D. Collier, Mack Peterson, Tom McQuire, Earl Young, Harry Turner, Wm. R. Bickler, Ray L. Wilson, Henry Lingenfelter and Clarence L. Judson, twelve good and lawful men who were duly sworn and empanneled according to law to try the issues herein.

Whereupon examination of witnesses by counsel is commenced.

And now the Court and Jury having heard all the proofs herein submitted, the testimony of witnesses produced and [fol. 35] sworn in open Court and the arguments of Vincent S. Lumley, State's Attorney, the case being submitted without further arguments, and the jury having heard the instructions of the Court, retire in charge of a sworn officer to consider of their Verdict.

And afterwards on this day come the Jury and return into open Court with their Verdict, which Verdict is in the words and figures following, to-wit:

BLEED THROUGH – POOR COPY

VERDICT NUMBER ONE

We, the jury, find the defendant Donald Loftus guilty of robbery in manner and form as charged in the indictment, and we further find that at the time of the commission of the robbery, the said defendant Donald Loftus was then armed with a dangerous weapon, to-wit: a pistol, and we further find from the evidence that the defendant Donald Loftus is about the age of 34 years.

P. Ben Anderson, Foreman; Harry Turner, Peter Wirfs, Henry Lingenfelter, Ray L. Wilson, Mack Peterson, Earl Young, Rupert D. Collier, Clarence L. Judson, Tom McGuire, Wm. R. Bickler, Clyde Hayford.

[fols. 36-37] It is ordered by the Court that leave be and same is hereby given Plaintiffs to withdraw People's Exhibit 1 and same to be given to Lester Edinger, Sheriff.

Whereupon comes the defendant herein and enters his motion for a new trial.

It is further ordered by the Court that defendant's motion for a new trial be and it is hereby set for hearing on Friday, April 22nd, 1932.

[fol. 38] MINUTE ENTRIES—April 22, 1932

Now on this day this cause coming on for hearing on defendant's motion for new trial heretofore entered herein, come The People of the State of Illinois by Vincent S. Lumley, State's Attorney and the defendant Donald Loftus, alias David Loftus, alias Dave Loftus, alias Dan Foreman, alias Richard Hollister, alias George Willis, alias Harold Gallagher in his own proper person as well as by David H. Feldman, his counsel, also comes. And now the Court having heard and duly considered the arguments of counsel, and being fully advised in the premises, overrules said motion.

Whereupon comes the defendant by David H. Feldman his counsel and enters his motion in arrest of judgment and the Court having heard and duly considered the arguments of counsel and being fully advised in the premises, overrules said motion.

It is further ordered by the Court that leave be and is hereby given to file a bill of exceptions herein.

It is therefore ordered by the Court that judgment enter herein on the verdict of the jury finding the defendant guilty as charged in the indictment.

JUDGMENT

This day come the said People by Vincent S. Lumley, State's Attorney and the defendant Donald Loftus, alias David Loftus, alias Dave Loftus, alias Dan Foreman, alias Richard Hollister, alias George Willis, alias Harold Gallagher as well in his own proper person as by David H. Feldman, his counsel, also comes, and now neither the said Defendant nor his counsel for him saying anything further why the judgment of the Court should not now be pronounced against him on the Verdict of Guilty, heretofore rendered to the Indictment in this cause.

[fols. 39-43] Therefore, it is ordered and adjudged by the Court that the said Defendant Donald Loftus, alias David Loftus, alias Dave Loftus, alias Dan Foreman, alias Richard Hollister, alias George Willis, alias Harold Gallagher who is found to be 34 years of age, and is convicted of the crime of Robbery With A Gun herein, be sentenced to the penitentiary of this State, at Joliet, Illinois, and it is further ordered and adjudged that the said Defendant Donald Loftus, alias David Loftus, alias Dave Loftus, alias Dan Foreman, alias Richard Hollister, alias George Willis, alias Harold Gallagher be taken from the bar of this Court to the Common Jail of McHenry County and from thence by the Sheriff of McHenry County within ten days to the Penitentiary of this State, at Joliet, and be delivered to the Warden or Keeper of said Penitentiary; and the said Warden or Keeper is hereby required and commanded to take the body of the said Defendant Donald Loftus, alias David Loftus, alias Dave Loftus, alias Dan Foreman, alias Richard Hollister, alias George Willis, alias Harold Gallagher and confine him in said Penitentiary in safe and secure custody, from and after the delivery thereof until discharged by due course of law, to-wit: from one year to life, the term of such imprisonment and commitment may be terminated earlier than the maximum by the Department of Public Welfare, by and with the approval of the Governor in the nature of a release or commutation of sentence or commitment.

BLEED THROUGH – POOR COPY

It is further ordered that the said Defendant pay all the costs of these proceedings, and that execution issue therefor.

It is further ordered by the Court that the sentence in this case is to run consecutively with the sentence of Case No. 25,503 that is, that the sentence in this case No. 25505 commence to run at the expiration of the sentence in 25,503.

It is further ordered by the Court that Sixty days be allowed in which to file Bill of Exceptions.

[fol. 44] In the Circuit Court of McHenry County

Indictment for Burglary—Filed April 9, 1932

People of the State of Illinois

vs.

Donald Loftus, Alias David Loftus, Alias Dave Loftus, Alias Dan Foreman, Alias Richard Hollister, Alias George Willis, Alias Harold Gallagher

1. The Grand Jurors chosen, selected and sworn, in and for the County of McHenry, in the name and by the authority of the People of the State of Illinois, upon their oaths present: That Donald Loftus, Alias David Loftus, Alias Dave Loftus, Alias Dan Foreman, Alias Richard Hollister, Alias George Willis, Alias Harold Gallagher, late of the County of McHenry and State of Illinois, on to-wit: the 19th day of September, in the year of our Lord, one thousand nine hundred and thirty, in the village of Algonquin, in the county aforesaid, a certain brick building then and there being situate and being used as a banking house, then and there being the property of the Algonquin State Bank, a Banking Corporation organized under and operating by virtue of the laws of the State of Illinois, then and there wilfully and forcibly did break and enter therein, with the intent to commit a felony therein, to-wit: larceny, and did then and there feloniously steal, take and carry away divers United States treasury notes, National Bank bills, gold certificates and silver certificates, the exact [fol. 45] denominations of which are to the Grand Jurors unknown, all good and legal tender of the United States,

and good and lawful money thereof, of the value of to-wit: Twenty-eight hundred sixty-nine ($2869) dollars, of the goods and chattels of the said Algonquin State Bank, in the brick building then and there being found, then and there feloniously did steal, take and carry away, contrary to the form of the statute in such case made and provided and against the peace and dignity of the People of the State of Illinois.

2. And the Grand Jurors chosen, selected and sworn, in and for the County of McHenry, in the name and by the authority of the People of the State of Illinois, upon their oaths further present: That Donald Loftus, Alias David Loftus, Alias Dave Loftus, Alias Dan Foreman, Alias Richard Hollister, Alias George Willis, Alias Harold Gallagher, late of the County of McHenry and State of Illinois, on to-wit: the 19th day of September, in the year of our Lord, one thousand nine hundred and thirty, in the village of Algonquin, in the County aforesaid, a certain brick building, then and there being situate and being used as a banking house, then and there being the property of the Algonquin State Bank, a Banking Corporation organized under and operating by virtue of the laws of the State of Illinois, then and there wilfully and maliciously did enter therein, the doors and windows being open, with the intent to commit a felony therein, to-wit: larceny, and did then and there feloniously, steal, take and carry away divers United States treasury notes, National Bank bills, gold certificates and silver certificates, the exact denominations of which are to the Grand Jurors unknown, all legal tender of the United States and good and lawful money thereof, of the value of to-wit: Twenty-eight hundred sixty-nine ($2869) dollars, of the goods and chattels of the Algonquin [fols. 46-48] State Bank, in the said brick building then and there being found, then and there feloniously did steal, take and carry away, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois.

Vincent S. Lumley, State's Attorney in and for McHenry County.

Upon the back of the same appear the following endorsements: Gen. No. 25506. Term No. —. McHenry County, Circuit Court, Jan. Term, A. D., 1932. The People vs.

BLEED THROUGH – POOR COPY

Donald Loftus, Alias David Loftus, Alias Dave Loftus, Alias Dan Foreman, Alias Richard Hollister, Alias George Willis, Alias Harold Gallagher. Indictment for Burglary. A True Bill. Frank C. Ferris, Foreman of the Grand Jury. Witnesses: George Keyes, Wilbur Brewer, Lester Edinger, Harold Reese, Gertrude Camm, Vincent S. Lumley, States Attorney. Capias Ordered and Bail Filed at $25,000.00. Edward D. Shurtleff, Judge.

[fols. 49-50] MINUTE ENTRIES—April 9, 1932

It appearing to the Court that the Grand Jury has returned an Indictment against the defendant herein it is ordered that a Capias Forthwith issue herein against the said defendant and that the said defendant's bail on said Capias be and it is hereby fixed at the sum of Twenty-five Thousand ($25,000.00) Dollars.

Now on this day come The People of the State of Illinois by Vincent S. Lumley, State's Attorney and the defendant, Donald Loftus alias David Loftus alias Dave Loftus alias Dan Foreman alias Richard Hollister alias George Willis alias Harold Gallagher in his own proper person also comes and the said defendant having been furnished with a copy of the Indictment and with lists of the witnesses and Grand and Petit Jurors for this Term of Court, it is therefore ordered that said defendant be arraigned for plea.

Whereupon comes the said defendant and states to the Court that he has no counsel and that his money is tied up and asks the Court for a week's continuance in order to get the proper counsel, Attorney W. W. Ryan, he at present being busy in Chicago.

Whereupon it is ordered by the Court that David R. Joslyn, Jr., be and he is hereby appointed temporary counsel to make motions in behalf of said defendant. And after conferring with David R. Joslyn, Jr. his counsel, again comes the said defendant and enters a temporary plea of not guilty of Burglary in manner and form as charged in said Indictment, until he has time to confer with his attorney, W. W. Ryan.

It is therefore ordered by the Court that said plea of not guilty be and same is hereby entered of record.

It is further ordered by the Court that this case be and the same is hereby continued until Monday April 18th, 1932.

[fol. 51] MINUTE ENTRIES—April 19, 1932

Now on this day this cause being called for trial come The People of the State of Illinois by Vincent S. Lumley, State's Attorney and the defendant Donald Loftus alias David Loftus alias David Loftus alias Dan Foreman alias Richard Hollister alias George Willis alias Harold Gallagher in his own proper person also comes.

It is therefore ordered by the Court that the jury be and they are hereby called to the jury box and sworn to answer questions.

Whereupon the defendant is informed by the Court that Maurice T. Johnson has asked to be excused from further service on this case and the Court states to the Defendant that Maurice T. Johnson had been appointed to defend defendant in two previous cases, and hearing the testimony, under the circumstances of the case, the Court is disinclined to appoint any member of the bar as defendant's counsel to appear as counsel in this case.

Whereupon it is ordered by the Court that Maurice T. Johnson be and he is hereby excused from further service as counsel for defendant in this case.

Whereupon the Court instructs the defendant that he will give him time to get counsel and the defendant informs the Court that he has no funds of his own to employ counsel and that they are tied up.

Whereupon the Court asks the defendant if he wishes to examine any of the jurors and defendant informs the Court that he does not care to examine any of the jurors.

And now Vincent S. Lumley, State's Attorney and the defendant having accepted the jurors, the following jurors, to-wit: A. L. Bennett, Frank Henry, Harry Holmes, Carl Kublank, Richard Anderson, Oscar Strom, Emil Popenhagen, Lew Pellet, Frank Narowetz, Edward Sersen, Everett McClure and Frank Berg, twelve good and lawful [fol. 52] men, were duly sworn and empanneled according to law to try this case.

Whereupon examination of witnesses is commenced, the defendant having asked some of the witnesses questions and now the Court having heard all the proofs herein submitted, the testimony of witnesses produced and sworn in open Court, no arguments of counsel being made, and the Jury having heard the instructions of the Court, retire in charge of a sworn Bailiff to consider of their Verdict.

BLEED THROUGH – POOR COPY

And afterwards on this day come the Jury and return into open Court with their Verdict and it is ordered by the Court that the Verdict be and the same is hereby read by the Clerk and filed.

Which Verdict is in the words and figures following, to-wit:

VERDICT

We the jury find the defendant, David Loftus, guilty of burglary in the manner and form as charged in the indictment, and we further find from the evidence that the defendant, David Loftus, is of the age of 28 years.

Harry Holmes, Frank Narowetz, A. L. Bennett, Emil Popenhagen, Oscar Strom, Edward Sersen, R. B. Anderson, Carl A. Kublank, Frank Henry, Lewis E. Pellet, E. L. McClure, Frank R. Berg

[fols. 53-54] Whereupon comes the defendant and enters his motion for a new trial herein.

It is thereupon ordered by the Court that defendant's motion for a new trial be and it is hereby set for hearing on Friday April 22, 1932.

[fol. 55] MINUTE ENTRIES—April 22, 1932

Now on this day this cause coming on for hearing on defendant's motion for a new trial heretofore entered herein, come The People of the State of Illinois by Vincent S. Lumley, State's Attorney and the defendant Donald Loftus alias David Loftus alias Dave Loftus alias Dan Foreman alias Richard Hollister alias George Willis alias Harold Gallagher in his own proper person as well as by David H. Feldman, his counsel, also comes. And now the Court having heard and duly considered the arguments of counsel and being fully advised in the premises, overrules said motion.

Whereupon comes the defendant by David H. Feldman his counsel and enters his motion in arrest of judgment and the Court having heard and duly considered the arguments of counsel and being fully advised in the premises, overrules said motion.

It is further ordered by the Court that leave be and is hereby given to file a bill of exceptions herein.

It is therefore ordered by the Court that judgment enter herein on the verdict of the jury finding the defendant guilty as charged in the indictment.

JUDGMENT

This day come the said People by Vincent S. Lumley, State's Attorney and the Defendant Donald Loftus alias David Loftus alias Dave Loftus alias Dan Foreman alias Richard Hollister alias George Willis alias Harold Gallagher as well in his own proper person as by David H. Feldman, his counsel, also comes, and now neither the said defendant nor his counsel for him saying anything further why the judgment of the Court should not now be pronounced against him on the Verdict of guilty, heretofore rendered to the Indictment in this cause.

THEREFORE, it is ordered and adjudged by the Court that the said Defendant Donald Loftus alias David Loftus alias Dave Loftus alias Dan Foreman alias Richard Hollister alias George Willis alias Harold Gallagher who is found [fols. 56-60] to be 28 years of age, and is convicted of the crime of Burglary herein, be sentenced to the Penitentiary of this State, at Joliet, Illinois, and it is further ordered and adjudged that the said Defendant Donald Loftus alias David Loftus alias Dave Loftus alias Dan Foreman alias Richard Hollister alias George Willis alias Harold Gallagher be taken from the bar of this Court to the common jail of McHenry County and from thence by the Sheriff of McHenry County within ten days to the Penitentiary of this State, at Joliet, and be delivered to the Warden or Keeper of said Penitentiary; and the said Warden or Keeper is hereby required and commanded to take the body of the said Defendant Donald Loftus alias David Loftus alias Dave Loftus alias Dan Foreman alias Richard Hollister alias George Willis alias Harold Gallagher and confine him in said Penitentiary in safe and secure custody, from and after the delivery thereof until discharged by due course of law, to-wit: from one year to life, the term of such imprisonment and commitment may be terminated earlier than the maximum by the Department of Public Welfare, by and with the approval of the Governor in the nature of a release or commutation of sentence or commitment.

It is further ordered that the said Defendant pay all the costs of these proceedings and that execution issue therefor.

BLEED THROUGH – POOR COPY

It is further ordered by the Court that the sentence in this case is to run consecutively with the sentences in Cases Nos. 25,503 and 25,505 that is, it commences to run after the expiration of the sentences in 25,503 and 25,505.

It is further ordered by the Court that Sixty days be allowed in which to file Bill of Exceptions.

[fol. 61] In the Circuit Court of McHenry County

People of the State of Illinois

vs.

Donald Loftus, Alias David Loftus, Alias Dave Loftus, Alias Dan Foreman, Alias Richard Hollister, Alias George Willis, Alias Harold Gallagher

Indictment for Burglary—Filed April 9, 1932

1. The Grand Jurors chosen, selected and sworn, in and for the County of McHenry, in the name and by the authority of the People of the State of Illinois, upon their oaths present: That Donald Loftus Alias David Loftus Alias Dave Loftus Alias Dan Foreman Alias Richard Hollister Alias George Willis Alias Harold Gallagher, late of the County of McHenry and State of Illinois, to-wit: the 26th day of November, in the year of Our Lord, one thousand nine hundred and thirty, in the village of Marengo, in the County aforesaid, a certain brick building, then and there being situate, and being used as a banking house, then and there being the property of the First National Bank of Marengo, a Banking Corporation organized under and operating by virtue of the Federal Laws of the United States, then and there wilfully and forcibly did break and enter therein, with the intent to commit a felony therein, to-wit: Larceny, and did then and there feloniously steal, take and carry away divers United States treasury notes, National Bank bills, gold certificates and silver certificates, the exact denominations of which are to the Grand Jurors unknown, all legal tender of the United States, and good [fol. 62] and lawful money thereof, of the value of to-wit: Twelve Thousand, one hundred fifty ($12,150) dollars, of the goods and chattels of the said First National Bank of Marengo, a Banking Corporation, in the said brick building,

then and there being found, then and there feloniously, did steal, take and carry away, contrary to the form of the Statute in such case made and provided and against the peace and dignity of the People of the State of Illinois.

2. And the Grand Jurors chosen, selected and sworn, in and for the County of McHenry, in the name and by the authority of the People of the State of Illinois, upon their oaths further present: That Donald Loftus Alias David Loftus Alias Dave Loftus Alias Dan Foreman Alias Richard Hollister Alias George Willis Alias Harold Gallagher, late of the County of McHenry and State of Illinois, on to-wit: the 26th day of November, in the year of our Lord, one thousand nine hundred and thirty, in the village of Marengo, in the County aforesaid, a certain brick building then and there being situate and being used as a banking house, then and there being the property of the First National Bank of Marengo, a Banking Corporation organized under and operating by virtue of the Federal Laws of the United States then and there maliciously and wilfully did enter therein, the doors and windows being open, with the intent to commit a felony therein, to-wit: larceny, and did then and there feloniously steal, take and carry away divers United States treasury notes, National Bank bills, gold certificates and silver certificates, the exact denominations of which are to the Grand Jurors unknown, all legal tender of the United States and good and lawful money thereof, of the value of to-wit: Twelve thousand, one hundred fifty ($12,150) dollars, of the goods and chattels of the said First [fols. 63-65] National Bank of Marengo, a Banking Corporation, in the brick building then and there being found, then and there feloniously did steal, take and carry away, contrary to the form of the statute in such case made and provided and against the peace and dignity of the same People of the State of Illinois.

Vincent S. Lumley, State's Attorney in and for McHenry County, Illinois.

Upon the back of the same appear the following endorsements: Gen. No. 25504. Term No. —. McHenry County Circuit Court, Jan. Term A. D. 1932. The People vs. Donald Loftus Alias David Loftus Alias Dave Loftus Alias Dan Foreman Alias Richard Hollister Alias George Willis Alias Harold Gallagher. Indictment for Burglary. A True

BLEED THROUGH – POOR COPY

Bill. Frank C. Ferris, Foreman of the Grand Jury. Witnesses Harold Fiertag, Laura Renwick, Lester Edinger, Harold Reese, Richard Patrick. Vincent S. Lumley, State's Attorney. 33/437. Capias Ordered and Bail Fixed at $25000. Edward D. Shurtleff, Judge.

[fols. 66-67] Minute Entries—April 9, 1932

It appearing to the Court that the Grand Jury has returned an indictment against the defendant herein it is ordered that a Capias forthwith issue herein against the said defendant and that the said defendant's bail on said Capias be and it is hereby fixed at the sum of Twenty-five Thousand ($25,000.00) Dollars.

Now on this day come The People of the State of Illinois by Vincent S. Lumley, State's Attorney and the defendant, Donald Loftus alias David Loftus alias Dave Loftus alias Dan Foreman alias Richard Hollister alias George Willis alias Harold Gallagher in his own proper person also comes and the said defendant having been furnished with a copy of the indictment and with lists of the witnesses and Grand and Petit Jurors for this Term of Court, it is therefore ordered that said defendant be arraigned for plea.

Whereupon comes the said defendant and states to the Court that he has no counsel and that his money is tied up and asks the Court for a week's continuance in order to get the proper counsel, Attorney W. W. Ryan, he at present being busy in Chicago.

Whereupon it is ordered by the Court that David R. Joslyn, Jr. be and he is hereby appointed temporary counsel to make motions in behalf of said defendant. And after conferring with David R. Joslyn, Jr. his counsel, again comes the said defendant and enters a temporary plea of not guilty of Burglary in manner and form as charged in said indictment, until he has time to confer with his attorney, W. W. Ryan.

It is therefore ordered by the Court that said plea of not guilty be and same is hereby entered of record.

It is further ordered by the Court that this cause be and the same is hereby continued until Monday April 18th, 1932.

[fol. 68] MINUTE ENTRIES—April 19, 1932

Now on this day this case being called for trial come The People of the State of Illinois by Vincent S. Lumley, State's Attorney and the defendant Donald Loftus alias David Loftus alias Dave Loftus alias Dan Foreman alias Richard Hollister alias George Willis alias Harold Gallagher in his own proper person also comes.

It is therefore ordered by the Court that the Jury be and they are hereby called to the jury box and sworn to answer questions.

Whereupon the Court informs the defendant that he will give the defendant time to procure counsel and the defendant informs the Court that he has no counsel and no funds to procure counsel as his funds are tied up.

Whereupon the Court informs the defendant that he is disinclined to appoint any member of the bar as defendant's counsel owing to the circumstances in the previous cases where counsel was appointed.

And the Court having asked the defendant if he wished to examine any of the jurors and being informed by the defendant that he did not care to examine any of the jurors and now Vincent S. Lumley, State's Attorney, and the defendant having accepted the Jury, the following jurors, to-wit: Jas. Doherty, Waite Richards, Wm. Wolf, Melvin B. Johnson, Scott Thayer, Al Klemme, George Pugh, Geo. Riedesel, Wm. Graunke, Edward Becking, Ben Williams and John Shannon, twelve good and lawful men, were duly sworn and empanneled according to law to try this case.

Whereupon examination of witnesses by counsel is commenced, the defendant having asked some questions, and now the Court and Jury having heard all the proofs herein submitted, the testimony of witnesses produced and sworn in open Court, no arguments of counsel being made and the jury having heard the instructions of the Court, retire in [fols. 69-70] charge of a sworn bailiff to consider of their Verdict.

And afterwards on this day come the jury and return into open Court with their Verdict and it is ordered by the Court that the Verdict be and the same is hereby read by the Clerk and filed.

Which Verdict is in the words and figures following, to-wit:

BLEED THROUGH – POOR COPY

VERDICT

We the jury find the defendant, David Loftus, guilty of burglary in the manner and form as charged in the indictment, and we further find from the evidence that the defendant, David Loftus, is of the age of 35 years.

Alfred H. Klemme, Waite Richards, Geo. Riedesel, George Pugh, Wm. E. Graunke, Scott Thayer, Wm. J. Wolf, Melvin B. Johnson, Ben B. Williams, John Shannon, Ed C. Becking, James E. Doherty.

Whereupon comes the defendant and enters his motion for a new trial herein.

It is thereupon ordered by the Court that defendant's motion for a new trial be and it is hereby set for hearing on Friday April 22, 1932.

[fol. 71] MINUTE ENTRIES—April 22, 1932

Now on this day this cause coming on for hearing on defendant's motion for a new trial heretofore entered herein, come The People of the State of Illinois by Vincent S. Lumley, State's Attorney and the defendant Donald Loftus alias David Loftus alias Dave Loftus alias Dan Foreman alias Richard Hollister alias George Willis alias Harold Gallagher in his own proper person as well as by David H. Feldman, his counsel, also comes. And now the Court having heard and duly considered the arguments of counsel and being fully advised in the premises, overrules said motion.

Whereupon comes the defendant by David H. Feldman his counsel and enters his motion in arrest of judgment and the Court having heard and duly considered the arguments of counsel and being fully advised in the premises, overrules said motion.

It is further ordered by the Court that leave be and is hereby given to file a bill of exceptions herein.

It is therefore ordered by the Court that judgment enter herein on the verdict of the jury finding the defendant guilty as charged in the indictment.

JUDGMENT

This day come the said People by Vincent S. Lumley, State's Attorney and the defendant Donald Loftus alias David Loftus alias Dave Loftus alias Dan Foreman alias

Richard Hollister, alias George Willis alias Harold Gallagher as well in his own proper person as by David H. Feldman, his counsel, also comes, and now neither the said Defendant nor his counsel for him saying anything further why the judgment of the Court should not now be pronounced against him on the Verdict of Guilty, heretofore rendered to the Indictment in this cause.

Therefore, it is ordered and adjudged by the Court that the said Defendant Donald Loftus alias David Loftus alias Dave Loftus alias Dan Foreman alias Richard Hollister [fols. 72-75] alias George Willis alias Harold Gallagher who is found to be 35 years of age, and is convicted of the crime of Burglary herein, be sentenced to the Penitentiary of this State, at Joliet, Illinois, and it is further ordered and adjudged that the said Defendant Donald Loftus alias David Loftus alias Dave Loftus alias Dan Foreman alias Richard Hollister alias George Willis alias Harold Gallagher be taken from the bar of this Court to the Common Jail of McHenry County and from thence by the Sheriff of McHenry County within ten days to the Penitentiary of this State at Joliet, and be delivered to the Warden or Keeper of said Penitentiary; and the said Warden or Keeper is hereby required and commanded to take the body of the said Defendant Donald Loftus alias David Loftus alias Dave Loftus alias Dan Foreman alias Richard Hollister alias George Willis alias Harold Gallagher and confine him in said Penitentiary in safe and secure custody, from and after the delivery thereof until discharged by due course of law, to-wit: from one year to life, the term of such imprisonment and commitment may be terminated earlier than the maximum by the Department of Public Welfare, by and with the approval of the Governor in the nature of a release or commutation of sentence or commitment.

It is further ordered that the said Defendant pay all the costs of these proceedings, and that execution issue therefor.

It is further ordered by the Court that the sentence in this case is to run consecutively to the sentences in Cases Nos. 25,503, 25,505, and 25,506, that is, that the sentence in this case No. 25504 commence to run at the expiration of the sentences in 25,503, 25,505, and 25,506.

It is further ordered by the Court that Sixty days be allowed in which to file Bill of Exceptions.

BLEED THROUGH – POOR COPY

[fol. 76] In the Supreme Court of Illinois, September Term, A. D. 1946

General No. 29620

People of the State of Illinois, Defendant in Error,

vs.

Donald Loftus, Plaintiff in Error

Writ of Error to Circuit Court of McHenry County

Honorable Edward D. Shurtleff, Judge Presiding

Abstract of Record—Filed July 18, 1946

Rec. page

1. Placita.
2. Recall of Grand Jury.
3. Return of Indictment on April 9, 1932.
4. Indictment No. 25503, Count 1:

The Grand Jurors present that Donald Loftus, late of the County of McHenry, State of Illinois, on November 26, 1930, at and within said County and State, in and upon one Harold Fiertag feloniously did make an assault while armed with deadly weapons, to-wit: pistols, and the said Harold Fiertag, in bodily fear and danger of his life, feloniously did put, of the value of Twelve thousand, one hundred fifty ($12,150) dollars, of the goods and chattels of the First National Bank of Marengo, Illinois, a Banking Corporation, then and there being in his care, custody and control and against the will of the said Harold Fiertag, feloniously did rob, steal, take and carry away, contrary to the Statute, etc.

[fol. 77] 5. Count 2:

(The same as Count 1: Armed Robbery.)

6. Count 3:

(The same as Count 1: Armed Robbery, with the exception that Laura Renwick instead of Harold Fiertag was the one assaulted.)

7. Count 4:

(The same as Count 3: Armed Robbery.)

8. Indictment No. 25503 filed on April 9, 1932.
9. Capias.
10. Proceedings of April 9, 1932.

11. Defendant arraigned. Court appoints Counsel. Plea of Not Guilty entered. Cause continued until April 18, 1932.
12. Proceedings of April 18, 1932.
13. Motion to Quash the Indictment; denied. Jury called.
14. Come the following jurors: Simon Michels, A. L. Bennett, Frank Henry, Harry Holmes, Carl Kublank, Richard Anderson, Oscar Strom, Clarence Niesen, Al. Klemme, Elmer Miner, Lee Jacobs, and Gust Larson.

Motion for time to get witnesses. Court allows Counsel ten minutes to confer with defendant as to witnesses.

Verdict of the Jury:

15. "We, the jury, find the defendant, David Loftus, guilty of robbery in manner and form as charged in the indictment, and we further find that at the time of the commission of the robbery, the said defendant, David Loftus, was then armed with a dangerous weapon, to-wit: a pistol, and we further find from the evidence that the defendant, David Loftus, is about the age of 34 years."

Motion for a New Trial.
16. Proceedings of April 22, 1932.
17. Motion for a New Trial overruled.
Motion in Arrest of Judgment; overruled.
Judgment on Verdict.
[fol. 78] 18. Sixty days time to file Bill of Exceptions.
19. Certification of the Clerk.

Indictment No. 25505

20. Placita.
21. Recall of Grand Jury.
22. Return of Indictment on April 9, 1932.
23. Indictment No. 25505, Count 1:

The Grand Jurors present that Donald Loftus, late of the County of McHenry, State of Illinois, on September 19, 1930, at and within said County and State, in and upon one George Keyes feloniously did make an assault while armed with deadly weapons, to-wit: pistols, and the said George Keyes, in bodily fear and danger of his life, felo-
24. niously did put, of the value of Twenty-eight hundred sixty-nine ($2869) dollars, of the goods and chattels of the Algonquin State Bank, of Algonquin, Illinois, a Banking Corporation, then and there being in his care, custody and control and against the will of the said George Keyes,

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feloniously and violently did rob, steal, take and carry away, contrary to the Statute, etc.

Count 2:

(The same as Count 1: Armed Robbery.)

25. Count 3:

(The same as Count 1: Armed robbery, with the exception that Wilbur Brewer instead of George Keyes was the one assaulted.)

26. Count 4:

(The same as Count 3: Armed Robbery.)

27. Indictment No. 25505 filed on April 9, 1932.

28. Capias.

29. Proceedings of April 9, 1932.

[fol. 79] 30. Defendant arraigned. Court appoints Counsel. Plea of Not Guilty entered. Cause continued until April 18, 1932.

31. Proceedings of April 18, 1932.

32. Jury called.

33. Proceedings of April 19, 1932.

34. Telegram stating that Defendant's Counsel cannot appear for him on that day. Court appoints other Counsel.

Come the following jurors: Peter Wirfs, P. Ben Anderson, Clyde Hayford, Rupert D. Collier, Mack Peterson, Tom McGuire, Earl Young, Harry Turner, Wm. R. Bickler, Ray L. Wilson, Henry Lingenfelter and Clarence L. Judson.

Examination of witnesses.

35. Verdict of the Jury:

"We, the jury, find the defendant, Donald Loftus, guilty of robbery in manner and form as charged in the indictment, and we further find that at the time of the commission of the robbery, the said defendant, Donald Loftus, was then armed with a dangerous weapon, to-wit: a pistol, and we further find from the evidence that the defendant, Donald Loftus, is about the age of 34 years."

36. Leave given Plaintiff to withdraw Exhibit 1.

Motion for a New Trial.

37. Proceedings for April 22, 1932.

38. Motion for a New Trial overruled.

Judgment on Verdict.

39. It is further ordered by the Court that the Sentence in this case is to run consecutively with the sentence of Case No. 25503, that is, that the sentence in this case No.

25505 commence to run at the expiration of the sentence in 25503.

Sixty days time to file Bill of Exceptions.

40. Certification of the Clerk.

[fol. 80] Indictment No. 25506

41. Placita.

42. Proceedings of April 9, 1932.

Recall of Grand Jury.

43. Indictment No. 25506 filed on April 9, 1932.

44. Indictment No. 25506, Count 1:

The Grand Jurors present that Donald Loftus, late of the County of McHenry, State of Illinois, on September 19, 1930, in the village of Algonquin, in the county aforesaid, a certain brick building, the property of the Algonquin State Bank, a Banking Corporation, then and there wilfully and forcibly did break and enter therein, with the intent to commit a felony therein, to-wit: larceny, and did

45. then and there feloniously steal, take and carry away, good and lawful money of the value of to-wit: Twenty-eight hundred sixty-nine ($2869) dollars, of the goods and chattels of the said Algonquin State Bank, in the brick building being found, feloniously did steal, take and carry away, contrary to the Statute, etc.

46. Count 2:

(Burglary; the doors and windows being open.)

Endorsement of indictment No. 25506.

47. Capias.

48. Proceedings of April 9, 1932.

49. Defendant arraigned. Court appoints temporary Counsel. Plea of Not Guilty entered.

50. Proceedings of April 19, 1932.

51. Defendant is informed by the Court that Maurice T. Johnson has asked to be excused from further service on this case and the Court states to the Defendant that Maurice T. Johnson had been appointed to defend Defendant in two previous cases, and hearing the testimony, under [fol. 81] the circumstances of the case, the Court is disinclined to appoint any member of the bar as defendant's Counsel to appear as Counsel in this case.

Court orders Maurice T. Johnson be excused as Counsel.

Court instructs Defendant that he will give him time to

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get counsel and defendant informs the Court that he has no funds to employ counsel.

Court asks the defendant if he wishes to examine any of the jurors and defendant informs the Court that he does not care to examine any of the jurors.

The following named jurors were duly accepted: A. L. Bennett, Frank Henry, Harry Holmes, Carl Kublank, Richard Anderson, Oscar Strom, Emil Popenhagen, Lew Pellet, Frank Narowets, Edward Sersen, Everett McClure, and Frank Berg.

52. Examination of witnesses.

Verdict of the Jury:

"We, the jury, find the defendant, David Loftus, guilty of burglary in the manner and form as charged in the indictment, and we further find from the evidence that the defendant, David Loftus, is of the age of 28 years."

53. Motion for a New Trial entered by Defendant.

54. Proceedings of April 22, 1932.

55. Motion for a New Trial overruled.

Motion in Arrest of Judgment; overruled.

Judgment on Verdict.

56. It is further ordered by the Court that the sentence in this case is to run consecutively with the sentences in Cases Nos. 25503, 25505, that is, it commences to run after the expiration of the sentences in 25503 and 25505.

57. Sixty days time to file Bill of Exceptions.

Certification of the Clerk.

[fol. 82] Indictment No. 25504

58. Placita.

59. Indictment No. 25504 filed on April 9, 1932.

60. Recall of Grand Jury.

61. Indictment No. 25504, Count 1:

The Grand Jurors present that Donald Loftus, late of the County of McHenry, State of Illinois, on November 26, 1930, at and within the village of Marengo, in said County, a certain brick building, and being used as a banking house, being the property of the First National Bank of Marengo, a Banking Corporation, wilfully and forcibly did break and enter therein, with the intent to commit a felony therein, to-wit: Larceny,

62. and did feloniously steal, take and carry away, Twelve thousand, one hundred fifty ($12,150) dollars, of the goods and chattels of the said First National Bank of Marengo, a Banking Corporation, feloniously, did steal, take and carry away, contrary to the Statute, etc.

Count 2: (Burglary; the doors and windows being open.)

63. Endorsement of indictment No. 25504.

64. Capias.

65. Proceedings of April 9, 1932.

66. Defendant arraigned. Court appoints temporary Counsel. Plea of Not Guilty entered.

67. Proceedings of April 19, 1932.

68. Jury called. Court informs defendant that he is disinclined to appoint any member of the bar as defendant's counsel owing to the circumstances in the previous cases where counsel was appointed. And the Court having asked the defendant if he wished to examine any of the jurors and being informed by the defendant that he did not care to examine any of the jurors the following named jurors were [fol. 83] duly accepted: Jas. Doherty, Waite Richards, Wm. Wolf, Melvin B. Johnson, Scott Thayer, Al Klemme, George Pugh, Geo. Riedesel, Wm. Graunke, Edward Becking, Ben Williams, and John Shannon.

Examination of witnesses:

69. Verdict of the Jury:

"We, the jury find the defendant, David Loftus, guilty of burglary in the manner and form as charged in the indictment, and we further find from the evidence that the defendant, David Loftus, is of the age of 35 years."

Motion for a New Trial entered by defendant.

70. Proceedings of April 22, 1932.

71. Motion for a New Trial overruled.

Motion in Arrest of Judgment; overruled.

Judgment on Verdict.

72. It is further ordered by the Court that the sentence in this case is to run consecutively to the sentences in Cases Nos. 25503, 25505, and 25506, that is, that the sentence in this case No. 25504, commence to run at the expiration of the sentences in 25503, 25505, and 25506.

Sixty days time to file Bill of Exceptions.

73. Certification of the Clerk.

[fol. 84] ASSIGNMENTS OF ERRORS

I

The trial court erred in placing defendant on trial for the charges of Burglary as defendant had already been tried and convicted of the charges of Robbery, arising out of the same crimes.

II

The trial court erred in withdrawing temporary counsel and denying the appointment of other counsel, forcing defendant to continue the case without counsel.

III

The entry of consecutive sentences was not made in accordance with the law, and therefore the sentences should be considered to run consecutively.

IV

The trial court erred in allowing seven (7) of the petit jurors to serve as the various trials in these causes, of which there were four.

V

Defendant was denied of due process and equal protection of the laws, in violation of both state and federal constitutions.

Wherefore, plaintiff in error prays that the judgment of the Court below may be reversed.

Respectfully submitted, Donald Loftus, Plaintiff in Error, Attorney Pro Se.

(M. ben Solomon) on Brief.

[fol. 85] IN SUPREME COURT OF ILLINOIS

MINUTE ENTRY—September 16, 1946

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that plaintiff in error hath filed herein a duly certified transcript of the record and proceedings of the Court below,

together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said defendant in error having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

[fol. 86] IN SUPREME COURT OF ILLINOIS

OPINION—Filed November 20, 1946

[fol. 87] Mr. Justice Stone delivered the opinion of the court:

By this writ of error plaintiff in error, appearing *pro se*, seeks the reversal of four judgments of the circuit court of McHenry county, entered in four separate and distinct cases, in April, 1932. The cause is here upon the common-law record in each case.

In circuit court case No. 25503 the jury found plaintiff in error guilty of robbery while armed with a dangerous weapon and his age to be 34 years. Motions for a new trial and in arrest of judgment were overruled and judgment entered on the verdict. What judgment was entered is not shown by the common-law record filed herein.

In case No. 25505 the jury found him guilty of armed robbery. Motion for a new trial was overruled and, as in No. 25503, the record shows: "Judgment on the verdict. It is further ordered by the court that sentence in this case is to run consecutively with the sentence in case No. 25503, that is, that the sentence in this case, No. 25505, commence to run at the expiration of the sentence in No. 25503."

In case No. 25506, the indictment charged burglary and larceny of $2869 from the Algonquin State Bank. The jury found plaintiff in error guilty as charged. Motions for a new trial and in arrest of judgment were overruled

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and, as in No. 25505, the record shows: "Judgment on the verdict. It is further ordered by the court that the sentence in this case is to run consecutively with the sentences in cases No. 25503 and 25505. That is, it commences to run after the expiration of the sentences in 25503 and 25505."

In case No. 25504 the indictment charged burglary and larceny of $12,150 from the First National Bank of Marengo. The jury found plaintiff in error guilty as charged. Motions for a new trial and in arrest of judgment were overruled and, as in the previous cases, the transcript of the record states: "Judgment on the verdict. It is further ordered by the court that the sentence in this case is to run consecutively to the sentences in Cases Nos. 25503, 25505 and 25506, that is, that the sentence in this case No. 25504, commence to run at the expiration of the sentences in 25503, 25505 and 25506."

The errors relied upon for reversal are that the trial [fol. 88] court erred: (1) in placing plaintiff in error on trial for the crimes of burglary, as he had been tried and convicted of the crime of robbery arising out of the same facts; (2) in withdrawing temporary counsel and denying the appointment of other counsel, forcing him to continue the case without counsel; (3) in entering consecutive sentences, which was not in accordance with the law, as the sentences should be considered to run concurrently; (4) in allowing seven of the petit jurors to serve on the various trials in these causes, of which there were four, and (5) in that he was denied due process and equal protection of the law, in violation of both State and Federal constitutions.

Defendant in error in its brief has filed a motion to dismiss the writ of error upon the ground that there is no law or rule of court which permits the filing of one writ of error to review more than one record. No statute or rule of court is cited in support of the motion. We know of no such statute and rule where, as here, the attack is upon the procedure in one case, necessarily involving examination of the record in another case to determine the error assigned in a particular case or record. It is within the power of this court, either of its own motion or upon motion of either party to the record to consolidate several cases for hearing. In *People* v. *Wooten*, 392 Ill. 542, this court, in one writ of error, passed upon the validity of three separate and distinct judgments in criminal cases.

Plaintiff in error's first contention is that it was error to place him on trial in Nos. 25504 and in 25506, each of which charged burglary, because he had *been* previously been convicted in Nos. 25503 and 25505 of armed robbery, and that the armed robbery and burglary charges arose from the same offense, therefore he was twice put in jeopardy by his trial and convictions in Nos. 25504 and 25506 for the same offenses for which he was convicted in 25503 and 25505.

Section 10 of article II of the constitution of 1870 provides: "No person shall be * * * twice put in jeopardy for the same offense." What constitutes the "same offense" was discussed at length by this court in the early case of *Freeland* v. *People,* 16 Ill. 380. It was there stated that "if the defendant upon the first indictment could not have been convicted of the *offense* described in the second, then an acquittal or conviction upon the former is no bar to the latter. * * * If the defendant could not, by any [fol. 89] legal possibility have been convicted upon the former prosecution of the *offense* charged in the second, he can in no just sense be said to be in peril of a second conviction on the *same offense.*" Citing in support of this doctrine, 1 Chitty's Crim. Law, sec. 456; Archbold's Crim. Pl. 82; 3 Greenleaf on Evidence, sec. 36. The foregoing rule has been approved by this court in *Spears* v. *People,* 220 Ill. 72; *Campbell* v. *People,* 109 Ill. 565; *Ferguson* v. *People,* 90 Ill. 510; *Guedel* v. *People,* 43 Ill. 226.

Plaintiff in error insists the indictments in Nos. 25503 and 25504, charging respectively armed robbery and burglary, arose out of one and the same transaction, and that the indictments in Nos. 25505 and 25506, charging respectively armed robbery and burglary, also arose out of another single transaction. No reference is made in the indictments for armed robbery to the crimes having been committed in a building, or any other place which the statute names in defining burglary, nor was plaintiff in error accused in those indictments of wrongfully entering any such place. When plaintiff in error was placed on trial in cases numbered 25505 and 25506, it would not necessarily follow, even though that indictment were based on the same acts as those alleged in 25503 and 25504, that sentence under convictions in the last two numbered cases would bar prosecution under numbers 25505 and 25506. It is the rule that a person by one act may, in law, commit

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several offenses. *People* v. *Nall*, 242 Ill. 284; *Nagel* v. *People*, 229 Ill. 598.

No bills of exceptions have been filed, and no showing that a plea of former conviction was entered. There is no merit to this contention.

Plaintiff in error next contends it was error to permit temporary counsel appointed by the court to withdraw and to refuse to appoint new counsel for him, and in forcing him to trial without counsel. The record shows that in No. 25503 he was represented by the same counsel of his own choosing. In Nos. 25506 and 25504 counsel appointed by the court was permitted to withdraw. The court announced that "under the circumstances of the case he was disinclined to appoint any member of the bar as defendant's counsel to appear as counsel in this case." The court instructed the defendant that he would give him time to get counsel and defendant informed the court that he had no funds to employ counsel.

In No. 25503 plaintiff in error was represented by coun- [fol. 90] sel of his own choice. In 25505 counsel of his choice, by telegram, advised the State's Attorney that he could not be present at the trial. The court thereupon appointed counsel to defend and the cause proceeded to trial. In 25506 the court permitted counsel, appointed to defend plaintiff in error, to withdraw. The court advised plaintiff in error that he would give him time to get counsel, and plaintiff in error advised the court that he had no funds of his own to employ counsel and that they were "all tied up." The record shows that the same took place in No. 25504.

Under the statute, (Ill. Rev. Stat. 1931, chap. 38, par. 754,) the court is required to provide counsel for a defendant only when he shall state on oath he is unable to procure counsel. (*People* v. *Batey*, 392 Ill. 390; *People* v. *Fuhs*, 390 Ill. 67; *People* v. *Corbett*, 387 Ill. 41; *People* v. *Parcora*, 358 Ill. 448.) There is nothing in the record to show that plaintiff in error complied with the provisions of the statute in force at the time of his trials.

Plaintiff in error next contends these consecutive sentences were not in accordance with the law, and therefore, the sentences should be considered to run concurrently.

Since *Johnson* v. *People*, 83 Ill. 431, consecutive sentences have been held legal. To withhold sentence until the expiration of the former sentence would not only prove an

incovenience and cause confusion but would be of no advantage to the accused. (*People* v. *Decker*, 347 Ill. 258; *Fitzpatrick* v. *People*, 98 Ill. 269.) Jurisdiction to inflict cumulative punishment does not depend on whether both convictions shall be before the same tribunal, but whether the accused has, in fact, committed distinct violations of the law which merit separate, and therefore cumulative, penalties. The judgment entered in a case of cumulative punishment must be of such certainty that the commencement of the second and termination of the previous sentence may be seen from the record. It is not necessary that the judgment fix the day on which each successive term of imprisonment commences, but it is sufficient that each successive term begins at the expiration of the next previous one. It is obvious that the time for the commencement of the succeeding punishment could not be more definitely determined, since the prior term of imprisonment might be shortened by good behavior or by other agencies bringing about such result. (*People* v. *Decker*, 347 Ill. 258.) In the instant cases each sentence was from "one [fol. 91] year to life, the term of such imprisonment and commitment may be terminated earlier than the maximum, by the Department of Public Welfare, by and with the approval of the Governor in the nature of a release or commutation of sentence or commitment." Sentence in 25505 was to commence on the termination of sentence in 25503. Sentence in 25506 was to commence on the termination of the sentences, in 25503 and 25505, and sentence in 25504 was to commence on the termination of the sentences in 25503, 25505 and 25506. Plaintiff in error relies upon *People* v. *Wooten*, 392 Ill. 542, in support of his contention. That case is not in point, as the first two sentences were erroneous and the defendant had served more than the maximum term of imprisonment for which he could have been lawfully sentenced, therefore the erroneous judgments were each reversed. The judgment sentencing the defendant to one year to life, to commence after the expiration of the erroneous judgments was held to commence on the day of his incarceration in the penitentiary. Orders of commitment of plaintiff in error to consecutive terms of imprisonment were within the jurisdiction of the court and were neither void nor erroneous, and plaintiff in error's contention that his sentences should be held to run concurrently is without merit.

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Plaintiff in error's next contention is that it was error to allow seven of the petit jurors to serve on the various trials. There is no bill of exceptions in the record. There is nothing in the common-law record showing that any challenge was interposed to the qualification of any juror either for cause or peremptorily. This contention cannot be considered.

Plaintiff in error does not argue his assignment of error that he was denied due process and equal protection of the law, in violation of the State and Federal constitutions, except to say that he did not have fair trials.

The record in this case presents an unusual situation. An examination of the common-law record in each case does not show any reversible error, therefore the judgments in each case are affirmed.

Judgments affirmed.

[fols. 92-94] IN SUPREME COURT OF ILLINOIS

No. 29620

PEOPLE STATE OF ILLINOIS, Defendant in Error

vs.

DONALD LOFTUS, Plaintiff in Error

Error to Circuit Court McHenry County

JUDGMENT—November 20, 1946

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgments aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgments of the Circuit Court of McHenry County aforesaid, be affirmed in all things and stand in full force and effect, notwithstanding the said matter and things therein assigned for error.

[fol. 95] IN SUPREME COURT OF ILLINOIS

PETITION FOR REHEARING—Filed December 12, 1946

May It Please the Court:

Plaintiff in Error, Donald Loftus, respectfully suggests that this Honorable Court reconsider its Order of Affirmance of this cause, which was filed on November 20, 1946.

We respectfully contend that this Court overlooked and misapprehended the entire facts and the Records submitted to it.

We wish to call this Court's attention to its statement that plaintiff in error was seeking Reversal of *four* judgments. We only asked the Court to Reverse *two* judgments, not *four*. Page 19 of our Brief shows that plaintiff in error suggested to the Court that if it find that he did commit two robberies, under Indictment Nos. 25503 and 25505, then it must hold that the convictions under Indictment Nos. 25506 and 25504 are void, and should be Reversed.

The Court stated: "What judgment was entered is not shown by the common-law record." The statutory sentence for the crime of Robbery in 1932, was for a term of "one year or for life." Chap. 38, Sec. 501, Ill. Rev. Stat. 1931. [fol. 96] The statutory sentence for the crime of Burglary in 1932, was also for a term of "one year or for life." Chap. 38, Sec. 84, Ill. Rec. Stat. 1931. The sentence of the Court is read into the judgment. People v. Montgomery, 377 Ill. 241.

Plaintiff in error contends that he was charged under Indictment No. 25503 with the Armed Robbery of the First National Bank of Marengo, Illinois, on November 26, 1930, of the amount of $12,150. Indictment No. 25504 alleges the Burglary of the same bank, on the same date, and the same amount of money stolen.

Plaintiff in error did not commit two separate and distinct crimes involving the same set of circumstances. Under Indictment No. 25505 he was charged with the Armed Robbery of the Algonquin State Bank, of Algonquin, Illinois, on September 19, 1930, of the amount of $2869. Indictment No. 25506 alleges the Burglary of the same bank, on the same date, and the same amount of money stolen.

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This Court cites Freeland v. People, 16 Ill. 380, where it held:

> "If the defendant upon the first conviction could not have been convicted of the offense described in the second, the*b* a*b* acquittal or conviction upon the former is no bar to the latter. . . . If the defendant could not, by any legal possibility have been convicted upon the former prosecution of the *offense* charged in the second, he can in no just sense be said to be in peril of a second conviction on the *same offense*. Citing cases."

Both Robbery and Burglary contain within themselves the crime of Larceny. If one is tried for Robbery or Burglary, he may be found guilty of the lesser crime of Larceny. This the Court will have to admit. Therefore, plaintiff in [fol. 97] error could have been convicted of the former offense, which was charged in the second, and which is not based on either sound reasoning or the statute, for it stated:

> "No reference is made in the indictments for armed robbery to the crimes having been committed in a building, or any other place which the statute names in defining burglary, nor was plaintiff in error accused in those indictments of wrongfully entering any such place."

The gist of the crime of Robbery, is the force or intimidation. People v. Carpenter, 315 Ill. 87; People v. Stathas, 356 Ill. 313; People v. Guinto, 374 Ill. 404. The indictments in the instant cause contain every basic element which the statute provides. Chap. 38, Sec. 501, Ill. Rev. Stat. 1931. It is not necessary to state that a robbery was committed within any building, nor was it necessary to charge him with the wrongful entry of any building, in an Indictment for Robbery.

Burglary is the entering into a building, with the intent to commit Robbery or Larceny. Chap. 38, Sec. 84, Ill. Rev. Stat. 1931. The gravamen of Burglary is the felonious intent of defendant at the time he enters. People v. Glickman, 377 Ill. 360; People v. Myler, 374 Ill. 72; People v. Weiss, 367 Ill. 580.

Our contention is, that plaintiff in error cannot be charged with the crimes of *Robbery and Burglary* under the same set of circumstances. When plaintiff in error walked into

those banks, through open doors and in the daytime, while those banks were open for business, and committed the crimes of Armed Robbery, he did not commit two separate and distinct crimes. If he was guilty of Armed Robbery (which is admitted), then he certainly was not guilty of [fol. 98] Burglary. On the other hand, if this Court believes he was guilty of Burglary, then certainly it cannot state that he was also guilty of Robbery. Under the statute, if plaintiff in error is guilty of Burglary with intent to commit Larceny, as charged in the indictments, then he should not have been also found guilty of Robbery.

Plaintiff in error did not commit more than one offense, and he should have been charged only with one or the other offense. By indicting, trying and convicting him on both offenses, he was certainly placed in jeopardy, contrary to the state and federal constitutional provisions.

As both the Robbery and Burglary indictments charged plaintiff in error "did steal, take and carry away," he was charged with the identical crimes of "Larceny" in each indictment. This was double jeopardy, for he was already convicted of the Robbery charges first, then he was placed on trial for the Burglary charges.

The cases cited by this Court, People v. Ball, 242 Ill. 284, and Nagel v. People, 229 Ill. 598, are nowise in point. In the Nagel case, there was an acquittal for Robbery, then a conviction for Burglary with Intent to murder. How can this Court apply such a case to the instant one?

This Court relies upon the fact that no Bill of Exceptions has been filed, and therefore no showing that a plea of former conviction was entered. We will discuss this matter further on in our Brief.

It is contended by the Court, that there is nothing in the record to show that plaintiff in error complied with the [fol. 99] provisions of the statute. (Chap. 38, Sec. 730, Ill. Rev. Stat. 1931), in force at the time of his trials. It may readily be seen, that all four common-law records are prepared almost exactly alike. Cause No. 25503 shows that plaintiff in error was arraigned on April 9, 1932, at which time the trial court appointed Counsel. The other indictments show the same. The trial was continued until April 18, 1932.

This Court's statement, that plaintiff in error never complied with the statute, by stating upon oath that he is unable to provure counsel, is not based on the Record. Where-

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fore does this Court come to such a conclusion? Is it not a fact that the trial court *did* appoint Counsel on April 9, 1932, at the time of arraignment? Does not the record show that plaintiff in error stated to the court that he had no money? Surely the trial court did not appoint counsel *until* plaintiff in error placed himself squarely within the statute. The certified record supports our contention—not the Court's. As this cause was brought solely upon the common-law record, this Court should adhere to it and not read something into the record which is not found there.

On April 18, 1932, the trial was held in Case No. 25503, and the court-appointed Counsel appeared in plaintiff in error's behalf. Trial by jury was had and he was found guilty of Armed Robbery, though sentence was deferred until a later date.

On April 19, 1932, plaintiff in error's counsel could not appear as he was out of town, so he sent a telegram to the trial court, stating he could appear on that date. The trial court then appointed another counsel for plaintiff in [fol. 100] error in Case No. 25505. He was tried by a Jury and found guilty of Armed Robbery. Sentence was deferred until a later date.

Immediately thereafter, plaintiff in error was placed on trial in Case No. 25506, for the crime of Burglary. The same Counsel who appeared in Case No. 25505, sought leave of the court to withdraw, which was allowed. The trial court stated: "The Court is disinclined to appoint any member of the bar as defendant's Counsel to appear as Counsel in this case." Court then instructed Defendant that he would give him time to get counsel and defendant informed the Court that he had no funds to employ counsel, that they were tied up.

Surely, plaintiff in error did not have to place himself un-er oath again, in order to obtain Counsel. The trial court well knew plaintiff in error had no funds, for the court ordered all his money confiscated, and Did Appoint *Two Counsels,* Previously in His Behalf. The trial court forced plaintiff in error to stand trial without counsel, and plaintiff in error was found guilty of the crime of Burglary. He personally made an oral motion for a New Trial. Sentence was deferred until a later date.

Immediately after this trial, plaintiff in error was placed on trial in Case No. 25504. The same circumstances which prevailed in Case No. 25506 prevailed herein. He had no

Counsel and was forced to stand trial without counsel, and was found guilty of the crime of Burglary. He personally made an oral motion for a New Trial. Sentence was deferred to a later date.

[fol. 101] On April 22, 1932, plaintiff in error's *Original Counsel, Who Had Been Appointed By The Trial Court, Returned And Reentered The Case.* He motioned the court for a New Trial and in Arrest of Judgment, which were overruled. The court then imposed consecutive sentences.

Does this Court mean to imply that when a defendant has *four* separate trials as herein, that he must place himself under oath *in each case,* though counsel was appointed to appear for him in all cases? We find nothing in the statutes or previous rulings of this Court to such effect.

We made no complaint regarding the trial court not appointing Counsel for plaintiff in error before trial. But we did state that when the Second Counsel withdrew from the case, that the court should have appointed plaintiff in error still *another counsel*—or have continued the cases until his *Originally Appointed Counsel* returned from out of town. What prompted the trial court to rush the matter to trial? Why did the court deny appointing a *Third Counsel,* as long as it had already appointed *Two Counsels?*

The fact remains that the trial court not only appointed counsel for him in the first instance, but appointed a second counsel, when the first counsel was out of town and could not defend for plaintiff in error. The Court's theory as to the question of appointment of counsel is not borne out by the Record. Plaintiff in Error *did indeed comply with the statute.* There was no reason for him to state upon oath once more that he had no funds and could not employ counsel.

If this Court will adhere to the certified Record submitted [fol. 102] in this cause, it will have to admit that plaintiff in error must have placed himself squarely within the statute, else the trial court would not have appointed *Two Different Counsels.* Certainly the trial court knew the provisions of the statute, and did not act until plaintiff in error complied thereto. In the absence of a showing the true record prevails. Should this Court scan the records once more, it will see the fallacy of its ruling.

We now come to the matter of the entry of "consecutive sentences." Nowhere in our Brief do we question the right of a court to enter consecutive sentences. Our contention is,

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that the consecutive sentences were not entered in the manner in which this Court has held to be correct. While we are quite familiar with People v. Wooten, 392 Ill. 468, we did not base our contention on that case alone. In United States ex rel: Chasteen v. Denemark, No. 8364, Circuit Court of Appeals, 7th District, November 3, 1943, which reversed the *ol*wer court's ruling, it was held:

> "The judgment No. 1745996, was vague and indefinite in many respects. It contained only a number, mentioning no title or name of any court in which No. 1745995 was tried, nor the duration of any sentence imposed. Thus, tested by the standards enunciated in the cases cited, the phrase, "To be served consecutively with case No. 1745995," must be regarded as without effect. Nor can these defects be cured by the mittimus, which is only a transcript of the minutes of the conviction and sentence duly certified by the Clerk. The clerk can only certify to the order of the court, and the Bailiff of the Municipal Court can only execute the sentence of the court as recorded." People v. Graydon, 329 Ill. 398, 401, 160 N.N. 748.

All we find in the instant cause, is that the sentences are to run consecutive to a mere number. There is no mention of the title or name of any court in which the cases were [fol. 103] tried, nor the Duration Of Any Sentence Imposed. We cannot see how this Court can hold that such consecutively entered sentences can be held to be valid. The Court should hold that they can only be considered as running concurrently.

This Court states that because there is no Bill of Exceptions there is nothing in the common-law record showing that any challenge was interposed to the qualification of any juror either for cause or peremptorily. Again we state to the Court. We are confining ourselves to what the common-law record contains. No question is being raised herein that is solely within the confines of a Bill of Exceptions.

Can this Court honestly state that it is necessary for a challenge to be made to the juror's qualification in the matter of seven of those petit jurors serving in the four trials? Are such trials within the meaning of the "Due Process" clauses of the state and federal constitutions? Does this Court mean to say that because plaintiff in error did not

challenge the jurors that he cannot complain of such invalid and illegal trials? We believe that when a question of this sort is raised, and is proven by the Record, that this Court should take cognizance of it.

First of all we wish to again remind this Court that plaintiff in error was denied Counsel at the trials in Case Nos. 25506 and 25504. Is he presumed to know what to say and do? The duty of the trial court is to see that plaintiff in [fol. 104] error had a "Fair And Impartial Trial."

We have yet to read of a trial or trials that was conducted in the manner in which plaintiff in error was tried and convicted. Five jurors in the first trial served also in the third trial. One juror who served in the first trial served also in the second and third trials. One juror who served in the first trial also served in the fourth trial. Certainly, in view of such unorthodox proceedings, this Court cannot say that he was not denied "Due Process And Equal Protection Of The Law," inviolation of the State and Federal Constitutions. Is the constitutional mandate of a Fair And Impartial Trial to be overlooked, simply because plaintiff in error made no objection to such procedure?

Had the trial court protected plaintiff in error's rights and appointed Counsel for him, his rights certainly would have been protected. Or, if the trial court did not wish to appoint another Counsel, he either should have compelled the second Counsel to continue with the trials—or in the alternative, should have continued the cases until such time that his first appointed Counsel would return to the city.

Plaintiff in error contends that the trials had in these causes were not real trials, but mere shams, those of false pretense and fraud. Ex parte Sharp, 33 F. Supp. 464; Palko v. State of Connecticut, 1937, 58 Sup. Ct. 149; Mooney v. Holohan, Calif. 1935, 55 S. Ct. 340; Art. II/ Sec. 2, Illinois Constitution; and Fourteenth Amendment to the Constitution of the United States.

This Court admits in its Opinion, that: "The record in this case presents an unusual situation." However, it had not seen fit to Reverse, even though all pretense of a "Fair [fol. 105] And Impartial Trial" were cast aside. Such convictions cannot stand—they must not stand, if plaintiff in error is to receive the benefits and privileges provided by the state and federal constitutional provisions.

We trust that this Court will not condemn before it takes all the matters into consideration. After sifting the wheat from the chaff, it undoubtedly will come to the conclusion that it overlooked and misapprehended the full import of the facts alleged.

For the reasons set forth, it becomes necessary that this Court render a new Opinion, in which it should rule that plaintiff in error did not have a "Fair And Impartial Trial"; That he was twice put in jeopardy by his trial and convictions in Nos. 25504 and 25506; that he was denied the aid and assistance of Counsel at his two trials for Burglary; and that seven jurors serving in his four trials deprived him of his statutory and constitutional rights. The Court should Reverse Case Nos. 25506 and 25504, without remandment.

Respectfully submitted, Donald Loftus, Plaintiff in Error, Appearing Pro Se.

(M. ben Solomon) on Brief.

[fol. 106] IN SUPREME COURT OF ILLINOIS

ORDER DENYING REHEARING—January 20, 1947

And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a rehearing in this case.

[fol. 107] [Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 108] SUPREME COURT OF THE UNITED STATES

No. 59, October Term, 1947

DONALD LOFTUS, Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS

ORDER GRANTING CERTIORARI—February 9, 1948

On petition for writ of Certiorari to the Supreme Court of the State of Illinois.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

(5120)

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Specification of errors to be urged	12
Summary of argument	13
Argument	18
I. Due process of law under the Fourteenth Amendment was violated in each of the four cases by reason of the deprivation of petitioner's use of his own attorney	20
II. Due process of law under the Fourteenth Amendment was violated by the denial to petitioner and his appointed counsel of adequate opportunity for consultation and preparation before the trials on the two indictments for armed robbery	25
III. Due process of law under the Fourteenth Amendment required the representation of counsel in the trials for burglary on Indictments No. 25504 and No. 25506 under the circumstances of the particular situation	30
A. Petitioner's First Contention—That *Betts* v. *Brady* should be modified in limited particulars	33
B. Petitioner's Second Contention—That *Betts* v. *Brady* should be modified in limited particulars in cases arising in Illinois	37
C. Petitioner's Third Contention—That *Betts* v. *Brady* is distinguishable from the case at bar on circumstances not present in that case	41
Conclusion	44

CITATIONS

Cases:

	Page
Avery v. *Alabama*, 308 U. S. 444	28
Betts v. *Brady*, 316 U. S. 455	17, 40
Carter v. *Illinois*, 329 U. S. 173	3, 31
Dillingham v. *U. S.*, 76 F. (2) 36 (CCA 5th, 1935)	23
Foster v. *Illinois*, 332 U. S. 134	3, 20, 31
Hawk v. *Olsen*, 326 U. S. 271	27
House v. *Mayo*, 324 U. S. 42	21
Marino v. *Ragen*, No. 93, Oct. Term, 1947	3
Powell v. *Alabama*, 287 U. S. 45	22, 25, 28
Rice v. *Olson*, 324 U. S. 786	43
Smith v. *O'Grady*, 312 U. S. 329	19
Swarnes Adm's v. *Sitton*, 58 Ill. 155	42
Tompkins v. *Missouri*, 323 U. S. 485	20, 43
U. S. v. *Bergamo*, 154 F. (2) 31 (C.C.A. 3d, 1946)	23
Von Moltke v. *Gillies*, No. 73, October Term, 1947	23
White v. *Ragen*, 324 U. S. 760	28
Williams v. *Kaiser*, 323 U. S. 471	19, 34, 42

Constitution and Statutes:

Constitution of the United States:	
Sixth Amendment	31
Fourteenth Amendment	2, 12, 15, 20, 31, 44
Sec. 237, Judicial Criminal Code (28 U.S.C., sec. 344)	1
Illinois Rev. Stat. 1931, c. 38, par. 752	19
Illinois Rev. Stat. 1937, c. 38, sec. 771	1

Texts:

15 U. of Chi. L. Rev. 107	40
Clark, Criminal Procedure (2nd Ed.)	42

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 59

DONALD LOFTUS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent

BRIEF FOR PETITIONER

Opinion Below

The opinion of the Supreme Court of Illinois (R. 36-41) is reported at 395 Ill. 479, 70 N. E. 2d 573.

Jurisdiction

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Criminal Code, as amended by the Act of February 13, 1925 (U. S. C. Title 28, Sec. 344).

The decision of the Supreme Court of Illinois, in response to a statutory writ of error (Ill. Rev. Stat. (1937), c. 38, Sec. 771), affirmed four judgments convicting petitioner of crime. It was filed on November 20, 1946, and a petition for rehearing (R. 42), filed on December 12, 1946, was denied

on January 20, 1947 (R. 49). Petitioner's motion for leave to proceed *in forma pauperis* in this Court and his petition for certiorari were filed on March 29, 1947, and granted on February 9, 1948 (R. 50).

Questions Presented

(1) Whether the due process of law provided by the Fourteenth Amendment to the Constitution of the United States was violated by the deprivation of access by petitioner to his attorney in all four cases.

(2) Whether the due process of law provided by the Fourteenth Amendment to the Constitution of the United States was violated by the denial to petitioner and his appointed counsel of adequate opportunity for consultation and preparation before the trials on the two indictments for armed robbery (Nos. 25503 and 25505).

(3) Whether the due process of law provided by the Fourteenth Amendment to the Constitution of the United States required the representation of petitioner by counsel appointed by the court in the trials on the two indictments for burglary (Nos. 25504 and 25506) following his convictions pursuant to two other indictments for armed robbery (Nos. 25503 and 25505) involving the same alleged incidents, in the absence of his first appointed attorney.

Statement

A detailed account of the representation of petitioner at various stages in the proceedings of the trial court is necessary to a determination of the principal issue, *i.e.*, whether the petitioner's representation satisfied the requirements of due process of law. Variants in the factual situation on this issue are presented on the record of the arraignment on the four indictments, the trial on the two indictments

for armed robbery, and the trial on the two indictments for burglary. Also, the cumulative impact of the conduct of the case in the trial court at all stages with regard to the right of counsel has an important bearing upon the determination of fairness.

This Court is all too familiar with the limitations and inadequacies of the facts of record available for consideration in review of proceedings on writs of error in Illinois where no Bills of Exception are filed and reliance is confined to the common law record. *Cf.* concurring opinion of Mr. Justice Rutledge in *Marino* v. *Regan*, No. 93, October Term 1947 (Dec. 22, 1947), and particularly Footnotes 8, 9 and 10; *Cf.* also *Carter* v. *Illinois*, 329 U. S. 173 and *Foster* v. *Illinois*, 332 U. S. 134. This common law record includes the indictments and the judge's minute entries on the arraignment, the plea, the trial, verdict and the judgment. It leaves unanswered or for inference many questions vital to a full and complete recital.

* * * * * * *

Petitioner is a prisoner in the penitentiary, having served imprisonment since 1932.

On April 9, 1932, four indictments were entered against him by the Grand Jury of McHenry County, Illinois. He was accused of two bank robberies, said to have occurred at separate times and places, with charges made of both armed robbery and burglary in connection with each of the two separate incidents. Each indictment was filed and docketed as a separate case and the common law record shows that each case was tried separately.

Indictment No. 25503 for a robbery with a gun concerned the alleged robbery of the First National Bank of Marengo, Illinois (R. 1-4).

Indictment No. 25505, also for robbery with a gun, concerned the alleged robbery of the Algonquin State Bank, also in Illinois (R. 9-12).

Indictment No. 25504 for burglary arose out of the alleged robbery of the Marengo Bank (R. 23-25).

Indictment No. 25506, for burglary, arose out of the alleged robbery of the Algonquin State Bank (R. 17-19).

Further, on April 9, 1932, the petitioner was arraigned before the Circuit Court of McHenry County under each indictment. The minute entries in the common law record for that day show that in each case the petitioner appeared for arraignment without counsel, stated to the court his lack of counsel and inaccessibility to funds, and asked the court for a week's continuance in order to get his own counsel, a Mr. W. W. Ryan, who at that time was busy in Chicago (R. 5, 13, 19, 25). In each case the court rejected the petitioner's request, and appointed temporary counsel (R. 5, 13, 17, 25). The following entry appears in the minutes of the Circuit Court for April 9, 1932, in No. 25503:

> "Whereupon it is ordered by the court that David R. Joslyn, Jr. be, and he is hereby appointed temporary counsel to make motions in behalf of said defendant. Thereafter conferring with David R. Joslyn, Jr., his counsel, again comes the said defendant and enters a temporary plea of not guilty of robbery with a gun in manner and form as charged in said indictment, until he has time to confer with his attorney, W. W. Ryan.
>
> "It is therefore ordered by the court that said plea of not guilty be and the same is hereby entered of record" (R. 5).

A similar entry with the appropriate variation for the description of the offense charged appears in the common law record for the other cases (R. 13, 19, 25).

With pleas of not guilty having been entered in all four cases, they were set for trial Monday, April 18, 1932. On

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that day it appears from the common law record that a Mr. David H. Feldman appeared on petitioner's behalf in No. 25503 and No. 25505 (R. 5-6, 13). Although the background of Mr. Feldman's appearance does not appear from the common law record, the inference from the Petition for Rehearing (R. 42 at p. 46) [1] is that he was appointed by the court at some unidentified time between April 9, 1932, the date of the indictments, and April 18, 1932, the date set for trial.

When the first case involving indictment No. 25503 was called, Mr. Feldman, counsel for petitioner, moved the court for a continuance, which motion was denied by the court (R. 6). He then moved to quash the indictment and, after hearing arguments of counsel, that motion was also denied and the case called for trial (R. 6). The following then appears in the minute entry in No. 25503 for April 18:

> "It is further ordered by the court that Maurice T. Johnson be, and he is hereby appointed to assist David H. Feldman, defendant's counsel, in selecting the jury and trying the case."

The case was tried before a jury. At the close of the plaintiff's case, the defendant, by his counsel, moved for time to get witnesses; the following entry appears:

> "Whereupon the court allowed defendant's counsel 10 minutes to confer with defendant as to witnesses" (R. 6).

It does not appear from the entry whether or not witnesses were called for the defendant.

---

[1] Petitioner, in this Petition for Rehearing to the Supreme Court of Illinois, refers to the fact that "on April 22, 1932, plaintiff in error's Original Counsel, who had been appointed by the Trial Court, Returned and Re-entered the Case" (R. 46). That person, as the minute entries for April 22 show, was Mr. Feldman (R. 7, 15, 21, 27) who entered an appearance for petitioner at the trial of Indictments No. 25503 and 25505 (R. 5, 13).

Arguments of counsel were waived by agreement and the case was submitted to the jury which, having been instructed by the court, later in the day brought in a verdict of guilty in the manner and form as charged in the indictment. Counsel Feldman for the petitioner, entered a motion for a new trial.

On the same day (April 18, 1932), in No. 25505, Feldman also entered his appearance as counsel for the petitioner and also Attorney Maurice T. Johnson, appointed by the court in No. 25503 to assist Feldman, was listed as assisting (R. 13). After the jury was called and sworn, they were excused until the following day, Tuesday, April 19. On that day petitioner's counsel, Mr. Feldman, did not appear. A telegram from him to the State's Attorney was filed in the cause and appears in the minute entry for April 19, as follows:

> "Received at 2-7 Chicago, Ills., 948AM 19 Woodstock, Ill. States Atty. Lumley Court House, Woodstock, 'Ills. Cannot appear in court today for Loftus.
>
> David H. Feldman."

In the absence of petitioner's counsel, the court appointed Attorney Maurice T. Johnson to defend him. A jury was selected and empaneled and the trial proceeded. The common law record is uninformative as to the nature of the trial and it is not apparent whether or not witnesses were called for the petitioner. It does appear that arguments were made to the jury by the State's Attorney and, by inference, that no argument was made on behalf of petitioner by Attorney Johnson, appointed to defend him (R. 14). After the jury brought in a verdict of guilty, the following notice appears:

> "Whereupon comes the defendant herein and enters his motion for a new trial" (R. 15).

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On the same day, April 19, the trial proceeded in the two cases involving indictments Nos. 25504 and 25506 for burglary. In neither case was petitioner represented by counsel and in both cases the jury brought in the verdict of guilty.

The minute entry in No. 25506 reads as follows:

> "Whereupon the defendant is informed by the Court that Maurice T. Johnson has asked to be excused from further service on this case and the Court states to the Defendant that Maurice T. Johnson had been appointed to defend defendant in two previous cases, and hearing the testimony, under the circumstances of the case, the Court is disinclined to appoint any member of the bar as defendant's counsel to appear as counsel in this case.
>
> "Whereupon it is ordered by the court that Maurice T. Johnson be and he is hereby excused from further service as counsel for defendant in this case.
>
> "Whereupon the Court instructs the defendant that he will give him time to get counsel and the defendant informs the Court that he has no funds of his own to employ counsel and that they are tied up" (R. 20).

In the minute entry for the trial of indictment No. 25504, the following appears:

> "Whereupon the Court informs the defendant that he will give the defendant time to procure counsel and the defendant informs the Court that he has no counsel and no funds to procure counsel as his funds are tied up.
>
> "Whereupon the Court informs the defendant that he is disinclined to appoint any member of the bar as defendant's counsel owing to the circumstances in the previous cases where counsel was appointed" (R. 26).

No copy of the telegram from petitioner's originally appointed counsel, Mr. Feldman, which was included in the record in No. 25505 (R. 14) was entered in the judge's minute entries of these two trials, but it may be assumed that the court continued to be aware of his telegram. Thus,

it appears in both cases that the court not only determined to proceed with the trial of petitioner in the absence of his originally appointed counsel, but also excused from further service counsel which the court had appointed to defend petitioner in two previous cases, one tried that same day and the other the day before, and likewise refused to appoint any other member of the bar as petitioner's counsel, although informed by the defendant that he had no funds available to employ counsel on the spot.

The minute entries covering the actual trials on indictments Nos. 25506 and 25504 are not very informative. The court apparently asked the petitioner in each case if he wished to examine any of the jurors and was informed by the defendant that he did not care to examine any of the jurors, who were accordingly empaneled, without challenge, to include a number who had served in the trial of indictment No. 25503 (Cf. lists on R. 6, 14, 20, 26).[2]

The petitioner attempted to cross-examine the prosecution witnesses in both the trials (R. 20, 26). With this exception, it would seem that the trials proceeded without any element of defense, there being no arguments to the jury, or even motions such as had been made by the defendant petitioner's counsel, Mr. Feldman, in No. 25503 (R. 6). After the verdicts were brought in in both cases, the petitioner entered his own motion for new trial in each case.

The motions for new trials in each of the four cases were set down and heard on April 22 (R. 7, 15, 21 and 27). On that day petitioner was represented again by Mr. Feldman, his originally appointed counsel. He argued both motions for a new trial and motions in arrest of judgment in all four cases; they were overruled and the court ordered judg-

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[2] Six of the jurors who sat in No. 25503, involving the armed robbery of the Marengo Bank, sat in No. 25506, involving the burglary of the Algonquin Bank. One juror in No. 25503, a Mr. Al. Klemme, sat in No. 25504, involving the burglary of the same bank.

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ment entered. In each of the four cases judgment was entered on that day and the defendant petitioner sentenced to serve in the state penitentiary from one year to life, the term of such imprisonment and commitment to be terminated earlier than the maximum by the Department of Public Welfare and with the approval of the Governor. The sentences were consecutive, rather than concurrent, the judgment orders for Case No. 25505 reading that the sentence

> "is to run consecutively with the sentence in Case No. 25503" (R. 17);

further, in case No. 25506, that the sentence

> "is to run consecutively with the sentences in Case Nos. 25503 and 25505" (R. 23);

and further, in case No. 25504, that the sentence

> "is to run consecutively to the sentences in Case Nos. 25503, 25505 and 25506" (R. 28).

Hence petitioner, upon serving sentences under Nos. 25503 and 25505, as determined by the Department of Public Welfare, with the approval of the Governor, might still be required to serve additional imprisonment by reason of his conviction under No. 25504 and No. 25506. Petitioner is still confined in the penitentiary, having served more than sixteen years.

Petitioner sued out a writ of error on September 16, 1946, filing a duly certified transcript of the record and proceedings of the court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned (R. 35-36). However, only the abstract of record filed on July 18, 1946 (R. 29-34) and the assignments of error (R. 35) appear in this record; also it appears from the court's opinion that following the usual

procedure in considering writs of error, where no exceptions are filed, the Illinois Supreme Court only considered the common law record. (See first paragraph of opinion, R. 36, and last paragraph, R. 41.)

The opinion of the court on the writ of error assumed that petitioner sought the reversal of all four judgments of the Circuit Court of McHenry County entered in the four separate cases in April, 1932. (See opinion, R. 36.) The errors assigned included the general one that petitioner was denied due process and equal protection of the laws in violation of both State and Federal Constitutions and certain particular ones, including one that "the trial court erred in withdrawing temporary counsel and denying the appointment of other counsel, forcing defendant to continue the case without counsel" (R. 35).

In addition, the petitioner assigned as error his trials for burglary after he had been tried and convicted of robbery arising out of the same crimes, the entry of consecutive sentences as not made in accordance with the law and, finally, the allowance of some of the same jurors to serve in more than one of his various trials (R. 35).

In affirming the judgments, the Supreme Court of Illinois rejected the contention of the state that one writ of error could not be used to review more than one record. It rejected the double jeopardy contention on the ground that, under the decisions of the Illinois courts and the language of the various indictments, there was not a conviction "for the same offense" within the meaning of the Illinois State Constitution. The opinion also noted that no Bills of Exceptions had been filed and that there was no showing that a plea of former conviction was entered.

It rejected the contention that the consecutive sentences were not in accordance with law on the basis of decisions of the Illinois courts holding such sentences to be legal and defending the manner of their entry in this case.

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In rejecting the contention that it was error to allow some of the jurors to serve in more than one of the various trials, the Supreme Court of Illinois relied upon the technical defects in the handling of the case and did not meet the contention on the merits, saying:

> "There is no Bill of Exception in the record. There is nothing in the common law record showing that any challenge was interposed to the qualification of any juror either for cause or peremptorily. This contention can not be considered" (R. 41).

On the major point, involving the right to counsel, the Supreme Court of Illinois likewise placed its rejection on technical grounds. After referring to the statutory requirement that the court will provide counsel for a defendant

> "only when he shall state on oath he is unable to procure counsel"

the opinion read

> "there is nothing in the record to show that plaintiff in error complied with the provisions of the statute in force at the time of his trials" (R. 39).

It limited its consideration on this point to the question of whether the trial court had violated the state statute and did not go into the issue of whether or not the State or Federal Constitutions had been violated, saying only:

> "Plaintiff in error does not argue his assignment of error that he was denied due process and equal protection of the law, in violation of the State and Federal Constitutions, except to say that he did not have a fair trial." (R. 41).

Following there appears the somewhat cryptic and unparticularized conclusion that:

> "The record in this case presents an unusual situation. An examination of the common law record in each case does not show any reversible error, therefore the judgments in each case are confirmed."

Specification of Errors to Be Urged

The Supreme Court of Illinois erred:

(1) In affirming the judgments of the Circuit Court of McHenry County in the four cases involved.

(2) In failing to hold that petitioner was tried and convicted in each case in a manner which deprived him of due process and equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States.

(3) In failing to hold that petitioner was illegally denied and deprived of counsel.

(4) In holding that the petitioner could be tried for the crimes of robbery and burglary arising out of the same crime, without being placed in double jeopardy.

(5) In holding that sentences could be entered consecutively in a manner which does not conform with the law.

(6) In holding that it could not consider the assignment of some of the same jurors to more than one of the series of cases in which petitioner was tried.

(7) In failing to reverse the judgments and sentences of the Circuit Court of McHenry County, Illinois.

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Summary of Argument

I

Petitioner's conviction in any of the four cases can not be sustained if, in each case, he was illegally deprived of use of his own attorney. It is a denial of petitioner's right to a fair trial to force him to plead to an indictment without the aid and advice of his counsel, whose presence he requests, or to undergo trial on a serious criminal charge without such counsel; a defendant should be afforded a fair opportunity to secure counsel of his own choice.

In each of the four cases involved here, the minutes of the common law record show that at the time petitioner was arraigned he asked the court for a week's continuance in order to have the aid and assistance of his own counsel who was then busy in another city some distance away. In every case this request, reasonable upon its face, was rejected and the petitioner compelled to continue with the arraignment proceedings assisted by "temporary counsel" appointed "to make motions in behalf of said defendant." Insofar as the record shows, no motions were made and in each case the only action of the defense recorded was the entry of a "temporary plea of not guilty."

The Court need not consider whether the state would have been required to appoint counsel for petitioner in each of the four cases if it feels that defendant was not afforded a fair opportunity to secure counsel of his own choice.

II

The appointment of counsel for the defendant and their representation of him in the trials of indictments Nos. 25503 and 25505 did not constitute effective and substantial aid in that regard because they did not include the accustomed

incidents of advance consultation and opportunity for preparation before trial. The appointments in both cases constituted nothing more than a formal compliance with the state constitution's requirement that an accused be given the assistance of counsel under certain conditions. They did not satisfy the requirements of fairness inherent in the Fourteenth Amendment.

It is a fair inference from the common law record that during the most critical period of proceedings against the defendant, that is to say, from the time of his arraignment until the beginning of the trials when consultation, thorough-going investigation and preparation were vitally important, the defendant did not have the aid of counsel in any real sense, although he was entitled to it during that period as at the trial itself.

It appears definitely from the common law record that the counsel designated was unprepared at the time of the trials of indictments Nos. 25503 and 25505. When the first case was called (No. 25503) the appointed counsel for petitioner moved for a continuance which was denied. As the case was called for trial the court appointed an additional counsel to help the one designated before the trial in selecting the jury and trying the case; it is a fair inference then that the appointed counsel felt inadequately prepared for the task. This was dramatically confirmed when, at the close of the state's case, defendant's counsel moved for time to get witnesses and the minutes of the common law record revealed that the court allowed defendant's counsel 10 minutes to confer with him as to witnesses. It does not appear that any witnesses were called for the defense or whether or not there was cross-examination of the state's witnesses. Arguments were waived.

In the trial of the second case (No. 25505) on the following morning, April 19, when the first appointed counsel

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did not appear, petitioner was represented by the second appointed counsel, named to assist his originally appointed counsel on the preceding day in the first case. It does not appear from the record that either petitioner or the second appointed counsel had any opportunity to confer or prepare for the second case, the appointment being made at the outset of the session resuming trial upon the filing of the telegram by the state's attorney from the first appointed counsel that he could not appear in court that day.

Under this procedure, petitioner was denied the right of counsel with the accustomed incidents of consultation and opportunity for preparation before trial and, in effect, was stripped of his right to have sufficient time to advise with counsel and prepare his defense.

III

The circumstances of the particular situation in the trials of indictments Nos. 25504 and 25506 required representation by counsel appointed by the court for due process of law in the absence of petitioner's attorney. The withdrawal of temporary counsel for the trial of these two cases, the refusal of the court to appoint additional counsel, and the conduct of the trials without any representation for the defendant, resulted in a deprivation of his rights violative of the Fourteenth Amendment.

Petitioner, a layman, was confronted with the necessity of conducting his own trials so as to sustain his pleas of "not guilty." He had to conduct his own defense through the normal procedures of a criminal trial which, in its simplest form, involves such technicalities and requirements for judgment and experience as to impel customarily the retention of skilled counsel for the defendant able to employ such assistance. The jurys were empaneled, the state's witnesses were put on the stand and examined by

the state's attorney on direct, the opportunity for cross-examination was available, there was opportunity for presentation of arguments to the jurys, verdicts were rendered and the opportunity for appropriate motions after the verdict presented. Petitioner, as a layman unfamiliar with the rules of evidence or law pertaining to the charges for which he was being tried or the Illinois procedures by which he was being tried, was left without the aid of counsel to conduct his own defense through this series of proceedings.

Even in the simplest case such a necessity would raise a serious question as to the fairness of the trials. In these two cases, moreover, there were unusual and complicated problems of defense for which the aid of trained and competent counsel was essential to a fair trial. Inadequate and limited as the common law record is in these cases, it is apparent from that record that the lack of counsel substantially prejudiced the defense. Jurors who were open to challenge because they had served in the trials pursuant to one of the indictments for armed robbery, were empaneled, without challenge by the petitioner, in the trials for burglary, involving one of the same incidents. On appeal, failure of petitioner to interpose a challenge to the qualification of such jurors was used as a ground for not considering his contention that they were improperly utilized. Similarly, the failure of petitioner to enter a plea of former conviction and take an exception to a denial on the ground of double jeopardy was put forward as ground for finding no merit in his assignment of error to the effect that he had already been tried and convicted on charges arising out of the same crimes. Objections to testimony on direct examination, cross-examination, the offering of testimony on his own behalf, the request for adequate instructions, or the making of arguments to the jury offered opportunities

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to sharpen the consideration of these questions on the record and, perhaps, additional ones not on the record, which were both important to the defense and highly technical in character.

Under repeated decisions of this court, the inability of a layman to match a skilled prosecutor whom he confronts in the courtroom, deal with the law's complexity and requirement for skill and training in the adequate conduct of a criminal trial, or cope with the technical aspects of particularly difficult legal questions, have been deemed circumstances which required the aid of counsel to satisfy the requirements of due process. Those decisions are controlling here.

The circumstances of the particular situation, as recited above and apparent from the common law record, distinguish the holding of *Betts* v. *Brady*, 316 U. S. 455, and bring the present case within the purview of a series of decided cases in this court since that decision.

Furthermore, wholly apart from these distinguishing circumstances and subsequent controlling decisions, the ruling of *Betts* v. *Brady* should be specifically modified, in at least the limited particular, to require that when a party charged with a serious crime desires and requests the assistance of counsel in sustaining a plea of not guilty, the failure of the court to provide aid of counsel by effective appointment deprives the defendant of due process. To deny a party who is accused of serious crime and is desirous of sustaining a plea of not guilty, the aid of appointed counsel during the trial when he is unable to procure assistance of his own choice through lack of funds will invariably work hardship upon him in the conduct of his defense and render the proceedings devoid of that fairness which legislation, judicial ruling and public policy have determined to be fundamental to due process of law. It

will also continue to place a difficult burden of review of the detailed facts in each such case where the accused is denied the assistance of counsel he desires for his defense, which this tribunal can not discharge adequately with fairness to this class of unfortunate persons.

Such a ruling need not be extended to cover those classes of cases in which the defendant pleads guilty, upon being advised of his rights of trial or in which the defendant refuses to avail himself of this assistance or waives his right to it.

If the Court should feel that the application of such a rule by this Court to criminal proceedings in all jurisdictions is not necessary or desirable, because the laws and procedures of given jurisdictions are deemed adequate to protect the rights of persons accused of serious crimes, it should nonetheless employ this rule in such cases arising in the State of Illinois where the procedures open to a defendant to correct elements of unfairness involving the right to counsel are inadequate, cumbersome and unduly difficult.

Argument

The Supreme Court of Illinois affirmed petitioner's conviction in the four cases to which the writ of error was addressed upon the assumption that the petitioner did not argue or press his assignment of error that he was denied due process and equal protection of the law, in violation of the State and Federal Constitutions. (See opinion, R. 41). Therefore, it did not rule upon the question of whether or not the Constitution of the United States imposes an obligation upon a state: to afford a defendant accused of a serious crime a reasonable opportunity to secure and be defended by counsel of his own choice; or, in absence of counsel of his own choice, in the circumstances of the particular situation here, to provide appointive counsel to

assist him in conducting his defense; and to do so in such a manner and at such a time as to make such appointment effective to provide adequate opportunity for the accustomed incidents of consultation and preparation before trial.

Hence, it neither passed upon nor considered the federal questions presented here and its affirmance of the judgments of the Circuit Court of McHenry County should be reversed if the rights guaranteed to petitioner by the Fourteenth Amendment have been violated. Petitioner submits that they have been so violated. All that the opinion of the Supreme Court of Illinois passed on with regard to the right of petitioner to counsel was that the court below did not violate the state statute (Illinois Rev. Stat. 1931, c. 38, para. 752) which is to the effect that a court is required to provide counsel for a defendant when he shall state on oath that he is unable to procure counsel. This ruling of the Illinois Supreme Court, even if it were correct, based upon the absence from the common law record of any notation of such an oath, does not preclude or foreclose this Court from a review of the federal questions arising out of the denial of rights of counsel guaranteed by the due process of law clause of the Fourteenth Amendment. *Cf. Williams* v. *Kaiser*, 323 U. S. 471, *Smith* v. *O'Grady*, 312 U. S. 329.

We do not understand the Supreme Court of Illinois to hold or the State to contend that in this situation petitioner waived his rights to counsel; were it so contended, the facts of record rebut any such contention, showing that in each case petitioner both indicated his desire to obtain the services of his own counsel, or, in absence thereof, appointive counsel (R. 5, 13, 17, 25) and that the trial court granted petitioner's desire for counsel by designating such counsel (R. 5, 13, 17, 25). Nor is the state statutory requirement of

request for counsel under oath necessary to create the federal right to counsel such as is provided under the Fourteenth Amendment. *Tompkins* v. *Missouri*, 323 U. S. 485.

Accordingly, the contentions here are addressed primarily to whether or not petitioner had been deprived of the rights to counsel which are a "part of the due process which the Fourteenth Amendment exacts on the state which imposes sentence." *Foster* v. *Ill.*, 332 U. S. 134, 137. The discussion in this brief of assignments of error involving other substantive questions, including those of double jeopardy, the use of the same jurors in the various cases and the improper entry of consecutive sentences (see items 4, 5 and 6 in Specifications of Errors to be Urged), they being primarily matters of state law, will be used to illustrate the technical and difficult problems of defense which petitioner, as a layman, could not adequately handle.

I

Due Process of Law under the Fourteenth Amendment Was Violated in Each of the Four Cases by Reason of the Deprivation of Petitioner's Use of His Own Attorney.

In each of the four cases to which the writ of error in the Supreme Court of Illinois was addressed, the minutes of the common law record show that at the time the petitioner was arraigned he asked the court for a week's continuance in order that he might have the aid and assistance of his own counsel, a Mr. W. W. Ryan, who was then busy in another city some distance away (R. 5, 13, 19, 25). In each case this request was rejected and the petitioner compelled to continue with the proceedings without the services of his own attorney. In each case the court thereupon appointed "temporary counsel to make motions in behalf of said defendant" (R. 5, 13, 19, 25).

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In so far as the common law record shows, in the form of the judge's minutes of the arraignment proceedings, no motions were made and in each case the only action of the defense recorded was the entry of a "temporary plea of not guilty" to the particular crime "in manner and form as charged in said indictment" (R. 5, 13, 19, 25).

Thus the record presents in each of the cases below the situation of an accused forced to plead to an indictment without the aid and advice of his own counsel whose presence he requests.

This court has ruled recently in *House* v. *Mayo*, 324 U. S. 42 that a similar course of judicial conduct was a deprivation of petitioner's constitutional rights to a fair trial. In that case as in this one the attorney for the defendant was in another city at the time he was arraigned; the accused asked for time to communicate and consult with his attorney and that the proceedings be deferred until his attorney could be present; the request was denied; and he was forced to plead forthwith to the indictment. That case arose on a petition for habeas corpus which had been denied without requiring the respondent to answer and without a hearing. The Court treated the allegations as true. See 324 U. S. 43. Referring to these allegations, the *per curiam* opinion states:

> "From them it appears that the trial court, without warning, and over petitioner's protests, forced him to plead to the information without the aid and advice of his counsel, whose presence he requested. This was a denial of petitioner's constitutional rights to a fair trial, with the aid and assistance of counsel whom he had retained" (324 U. S. 45-46).

According to that opinion, in which all the court joined, except Mr. Justice Roberts, it was not necessary to its decision to determine in advance whether the state would

have been required to appoint counsel for petitioner on the facts alleged and the court, therefore, did not find it necessary to consider the line of cases involving that separate and highly controversial question to be discussed below (See III).

> "It is enough that petitioner had his own attorney and was not afforded a reasonable opportunity to consult with him" (324 U. S. 46).

Hence, here, if the rule of *House* v. *Mayo* is followed, the petitioner's rights to due process of law have been violated in each of the four cases regardless of the court's view as to whether or not appointed counsel was required on the peculiar circumstances of this case or the fact that "temporary counsel" was appointed for the arraignment proceedings.

The deep concern embodied in this holding of the right of an accused to have the benefit of assistance of his own lawyer in important criminal proceedings is emphasized by the court's specific notation that:

> "The fact that petitioner pleaded guilty after the denial of his request for time to consult with his counsel does not deprive him of his constitutional right to counsel" (324 U. S. 46).

There would seem to be all the more occasion for honoring this principle in the situation at hand where the accused was determined to fight the charges of the state and exercised every defensive measure made available to him in the criminal procedure both at the time of arraignment and in the subsequent trial.

The rule of *House* v. *Mayo* did not spring unheralded. It was presaged in the earlier leading case of *Powell* v. *Alabama*, 287 U. S. 45 (1932), which is also a compelling precedent here.

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In discussing the phase of the case involving the arraignment of the defendants upon the return of the indictment, when they pleaded not guilty, Mr. Justice Sutherland observed that:

> "It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice" (287 U. S. at page 53).

Cf. also *Dillingham* v. *U. S.* 76 F. 2d. 36 (CCA 5th, 1935); *cf.* also *U. S.* v. *Bergamo* et al., 154 F. 2d 31 (CCA 3d, 1946).

The wisdom of the principle is amply illustrated in subsequent events in the cases at bar. Petitioner found himself represented at some stages of the proceeding by one counsel appointed by the court on the spot, only to have the responsibilities for his freedom passed on to another stranger at the next stage of the proceedings, and, finally, undergoing the trial in certain of the cases with counsel previously appointed away on other business or permitted to withdraw from the proceedings. It can hardly be argued, human nature being what it is, that the caliber of defense made available to the accused by the appointive process in the ordinary criminal proceeding was equivalent in effectiveness to that which might have been available to petitioner had the trial court accorded him adequate opportunity to be represented by counsel of his own choice, feeling a personal responsibility to him as well as to the court.

In the case of *Von Moltke* v. *Gillies* (No. 73, October Term, 1947), the majority opinion of Mr. Justice Black described a situation which, while not invariably true of appointive counsel, must nonetheless be taken into account in measuring the damage to an accused's rights when he is denied an opportunity to employ his own counsel. It was said:

> "It is in this light that we view the appointment of counsel for petitioner when she was arraigned. This

> lawyer, apparently reluctant to accept the case at all, agreed to represent her only when promised by the judge that it would take only two or three minutes to perform his duty. And it seems to have taken no longer. Even though we assume that this attorney did the very best he could under the circumstances, we cannot accept this designation of counsel by the trial court as anything more than token obedience to his constitutionally required duty to appoint counsel for petitioner. Arraignment is too important a step in a criminal proceeding to give such wholly inadequate representation to one charged with a crime."

Without implying criticism of the appointive counsel in the trial court in the cases at bar, it is fair to say that both on principle and in view of the events of record, the action of the court in refusing petitioner adequate opportunity to be represented by his own counsel at the very outset of the case was a deprivation of due process of law.

One can imagine the sense of public outrage which the average person would feel if an esteemed neighbor or citizen were brought before the court and forced to submit to arraignment proceedings without benefit of his own counsel by reason of a denial of a week's delay to give him the opportunity to enjoy the services of his counsel at that time engaged in another city. The law requires the same deference to the rights of the obscure person charged with the crime of armed robbery or burglary.

Of course the exercise of this right and reliance upon it may be the subject of abuse to delay unduly the prosecution of criminals and to occasion empty gestures by parties who ultimately must depend upon the court for appointive counsel. Nothing in the record here implies a lack of *bona fides* in the request of petitioner for a continuance of the arraignment proceedings on April 9, 1932, in order that he might utilize the assistance of his counsel, Mr. W. W. Ryan.

These proceedings, therefore, at the outset became charged with unfairness and disadvantage to the petitioner. The rejection of petitioner's request by the trial court had an indelible and imponderable effect upon the entire proceedings, which is not erasable except by an order reversing the Supreme Court of Illinois' affirmance of the judgments below.

II

Due Process of Law under the Fourteenth Amendment was violated by the denial to Petitioner and his appointed Counsel of adequate opportunity for consultation and preparation before the trials on the two indictments for armed robbery

The next phase of the rule of *Powell* v. *Alabama* involved here arises from facts of record which demonstrate, petitioner contends, that such designation of counsel as was attempted in the cases on Indictments No. 25503 and No. 25505 did not afford adequate opportunity for consultation and preparation and amounted to "a denial of effective and substantial aid in that regard." See *Powell* v. *Alabama*, 287 U. S. at p. 53.

The controlling facts available from the common law record concerning the nature, character and circumstances of the representation of petitioner by counsel in the trials on indictments No. 25503 and No. 25505 have been set forth above. (See Statement, pp. 4-6). There may be many other facts which might support the conclusion that defendant was deprived of the effective aid and assistance of counsel which due process would require; such other facts can not be ascertained from the common law record.

For example, there is no information as to the date of the appointment of Mr. Feldman, the original appointed counsel, who appeared for petitioner throughout the trial on No. 25503 and part of the trial on No. 25505. It was some

time between April 9, the date of the arraignment, and April 18, the date of the trial on No. 25503. We do know that the burden of representation in the trial on No. 25505 fell on Mr. Johnson, in the absence of Mr. Feldman on April 19; and that Mr. Johnson had only been appointed the day before to assist Mr. Feldman in selecting the jury; and, apparently, Mr. Johnson did not expect to carry the brunt of the trial until confronted by Feldman's absence and the court's reappointment on April 19.

It can be strongly inferred from Feldman's conduct, as reported in the judge's minutes on the trial of No. 25503 on April 18 that he considered himself wholly unprepared. His first move was for a continuance. It was denied.

A commentary on and reflection of his lack of preparation was the necessity which prompted his asking the court for time at the end of the state's case to confer with his client (petitioner) as to witnesses for the defense. One can assume that a defense attorney who has not consulted adequately with his client before the end of the state's case is woefully unprepared; nor did the court's ungenerous allowance of ten minutes to prepare on that subject compensate for this apparent disadvantage. Forced to rely here on the common law record, one can only conjecture concerning the extent and character of the defense during the examination of witnesses and the issuance of instructions. It is clear from the record that arguments for the defense were waived in both Nos. 25503 and 25505.

We are not forced to rely upon conjecture to determine the extent of preparation and consultation permitted to petitioner and appointed counsel for the arraignment proceedings in *all four of the cases* (R. 5, 13, 17, 25). The petitioner appeared for himself at the outset, moved for a continuance in order to have the services of his own counsel, and was represented by "temporary counsel," a Mr. Joslyn,

who was appointed by the court upon the denial of the motion for continuance. The minutes of the judge note that "Thereafter conferring with his counsel . . . again comes the said defendant and enters a temporary plea of not guilty" (R. 5, 13, 17, 25). Since the whole arraignment proceedings in all four cases occurred on April 9, 1932, little opportunity for consultation and preparation was permitted.

Hence, even with the limitations that the common law record imposes upon the development of the deprivation of effective aid and assistance of counsel in this proceeding, there is an adequate basis in controlling recent decisions of this Court for setting aside the judgments below.

In *Hawk* v. *Olsen*, 326 U. S. 271, this Court enunciated the principle that should govern here. In reversing an order of a state court dismissing a petition for a writ of *habeas corpus* the court accepted as true allegations of fact which, while not identical with those here apparent on the record, are substantially similar in their result. See 326 U. S. 276-7. In that case, as in this one, the defendant was arraigned, had no assistance or advice except those designated by public authority to defend him; in that case the defendant moved the trial court for a continuance for the purpose of consulting counsel and preparing his defense; in this case the defendant both moved the court for continuance at the time of the arraignment in order to consult his own counsel and the appointed counsel at the time of the trial moved the court for a continuance in order to have time for adequate preparation for trial; in that case as is apparently true in this one, the trial was initiated without an opportunity for adequate consultation between the defendant and the officers of the court whose duty it was to defend him—or any substantial measures of preparation for trial.

In its review, this Court felt it a duty to determine whether or not the denial of a motion for continuance under the facts

alleged violated due process. This statement in the opinion of Mr. Justice Reed seems equally applicable to this case:

> "We think there was an allegation that no effective assistance of counsel was furnished in the critical time between the plea of not guilty and the calling of the jury. Continuance may or may not have been useful to the accused, but the importance of the assistance of counsel in a serious criminal charge after arraignment is too large to permit speculation on its effect. We hold that denial of opportunity to consult with counsel on any material step after indictment or similar charge and arraignment violates the Fourteenth Amendment" (326 U. S. 278).

The principle embodied in *Hawk* v. *Olsen* had been previously established by this Court in older decisions. See *Powell* v. *Alabama*, 287 U. S. 45; *Avery* v. *Alabama*, 308 U. S. 444 and *cf. White* v. *Ragen*, 324 U. S. 760 at pages 762-764.

The facts in the leading case of *Powell* v. *Alabama* are well known to this Court but include other elements not present here which might preclude one from urging it as a compelling precedent on the facts. But the expression of the principle involved here in Justice Sutherland's opinion seems appropriate to this case. The opinion said:

> "In any event, the substance lends emphasis to the conclusion that during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself" (287 U. S. 57).

Subsequently, in the opinion, in commenting upon the problem of continuances in criminal proceedings and the

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desirability of the prompt disposition of criminal cases, it was said:

> "But in reaching that result, a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice" (287 U. S. 59).

The decision of this Court in *Avery* v. *Alabama, supra,* in no sense qualified these principles and that case is clearly distinguishable upon its facts from the one at bar. The opinion of the Court, delivered by Mr. Justice Black, carefully preserved the essence of the doctrine of effective appointment, stating:

> "but the denial of opportunity for appointed counsel to confer, to consult with the accused, and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitutional guaranty of assistance of counsel can not be satisfied by mere formal appointment" (308 U. S. at 446).

In holding that the fact, standing alone, that a continuance has been denied, does not constitute a denial of the constitutional right to assistance of counsel, the Court nonetheless imposed upon itself the obligation of scrupulously reviewing the record to ascertain whether other facts would lead to a determination that the defendant's constitutional right to counsel was violated. It did so review the record in that case in detail. It concluded that the record showed that petitioner's attorneys in that case were able to make adequate inquiries in the vicinity of the crime between their appointment on Monday and the trial on Thursday. It was also concluded that the examination and preparation of the case had been adequate for counsel to exhaust its every angle.

The character of the analysis of the record in *Avery* v. *Alabama*, poses the issue for the Court in this case. Is the Court of the opinion, on the facts of record available here, that the circumstances of this case show a fairly conducted trial with a careful safeguard of petitioner's rights? Or is it of the opinion that the proceedings below may be more properly characterized by the now famous description of the situation in *Powell* v. *Alabama*.

> "It is not enough to assume that counsel thus precipitated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thorough-going investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given. Defendants were immediately hurried to trial. Chief Justice Alderson, after disclaiming any intention to criticize harshly counsel who attempted to represent defendants at the trials, said: 'The record indicates that the appearance was rather pro forma than zealous and active.' Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense. To decide otherwise, would simply be to ignore actualities. This conclusion finds ample support in the reasoning of an overwhelming array of state decisions . . ." (287 U. S. 58).

III

Due Process of Law under the Fourteenth Amendment required the representation of Counsel in the trials for burglary on Indictments Nos. 25504 and 25506 under the circumstances of the particular situation

It is also a well settled principle of "the rule of Powell *v.* Alabama" that "in the circumstances of a particular situation", assignment of counsel by the court for indigent defendants in criminal cases may be "essential to the sub-

stance of a hearing" as part of the due process which the Fourteenth Amendment exacts from a State which imposes sentence. See *Foster* v. *Illinois*, 332 U. S. 134; *Carter* v. *Illinois*, 329 U. S. 173.

A minority of this Court has consistently contended that the Sixth Amendment guaranty of the right to counsel in criminal cases is applicable to proceedings in state as well as federal courts on the theory that the Fourteenth Amendment made the Sixth applicable to states. cf. the dissenting opinion of Mr. Justice Rutledge in *Foster* v. *Illinois*, *supra*; cf. also dissenting opinion of Mr. Justice Black in *Betts* v. *Brady*, *supra*. Likewise, a minority would esteem the right to counsel to be fundamental to the fairness requisite in serious criminal cases for due process as provided by the Fourteenth Amendment, apart from the Sixth. cf. dissenting opinion of Mr. Justice Black in *Betts* v. *Brady*, *supra*, at pp. 475 *et seq.*

The Statement contains a full recital of the circumstances in the trials of petitioner on indictments Nos. 25504 and 25506, within the limitations imposed by the common law record, as they give rise to a consideration of and application in this case of this phase of "the rule of Powell *v.* Alabama." (See Statement, pp. 6-9). It is sufficient to repeat here that the trial court permitted previously appointed counsel to withdraw from these cases on the day of the trials but before the trials began; that it refused to appoint substitute counsel despite petitioner's remonstrance that he had no funds of his own available to employ counsel; that the petitioner, a layman was forced to conduct his own defense in the trial of the cases on not guilty pleas to charges of burglary; that the trials included the usual steps of empaneling a jury, the submission of testimony, the opportunity for argument, the giving of instructions, the return of verdicts with the opportunity for post verdict measures of defense; and, lastly, that these trials involved

peculiar and highly technical legal questions such as double jeopardy and disqualification of jurors, by reason of previous trials on the same incidents on armed robbery indictments before some of the same jurors.

On these facts the treatment of the question under this heading necessarily brings the case within the area of difference between the majority and minority position on "the rule of Powell *v.* Alabama" as indicated above. At the outset here we shall try to indicate precisely where the contentions impinge upon these differing views recently voiced.

All of petitioner's three contentions below under this heading are within the framework of the test set forth recently by the majority in *Foster* v. *Illinois, supra.* They are addressed to the challenge there set forth:

> "And, so, in every case in which this doctrine was invoked and due process was found wanting, the prisoner sustained the burden of proving, or was prepared to prove but was denied opportunity, that for want of benefit of counsel an ingredient of unfairness actively operated in the process that resulted in his confinement" U. S.

But the first two of petitioner's contentions below are addressed to limited modifications of the holding of the majority in *Betts* v. *Brady, supra,* which this case and a review of the authorities indicate as desirable. The third contention below is that the holding in *Betts* v. *Brady, supra,* is distinguishable on its facts from the case at bar and, therefore, is not controlling.

It will be petitioner's first contention that the Court should specifically or inferentially modify its holding in *Betts* v. *Brady* in at least one particular, namely, to require that when a party charged with a serious crime desires and requests the assistance of counsel in sustaining a plea of

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not guilty the failure of the court to provide aid of counsel during the course of the trial by effective appointment deprives a defendant of due process.

It may be that the Court will feel that this should not be extended to cases arising in jurisdictions where the laws and procedures are deemed adequate to protect the rights of persons accused of serious crime. It is petitioner's second contention that, in any event, the Court should specifically announce this rule for such cases arising in the state of Illinois, so long as the procedures open to a defendant to correct elements of unfairness involving the right to counsel or other deprivations of constitutional right after conviction are inadequate, cumbersome and unduly difficult in that jurisdiction.

Petitioner's third contention is that the case at bar is distinguishable on its facts from *Betts* v. *Brady* and that circumstances exist here, which, under more recent controlling decisions of this Court, justify a determination that the requirements of the rule of *Powell* v. *Alabama* have been met and due process of law not accorded.

A. *Petitioner's First Contention*

In the leading case of *Powell* v. *Alabama*, the Court indicated the essential scope of the doctrine that assignment of counsel may be essential to due process exacted by the Fourteenth Amendment in particular situations because it might be essential to the substance of the hearing. The reasoning in the opinion of Mr. Justice Sutherland in that case has an important bearing here. He said:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment

> is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel in every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence" (287 U. S. 68-69).

These considerations have a peculiar and especial validity in situations where a person, charged with serious crime, feels the need of and requests the assistance of appointive counsel because he does not have the funds or the opportunity to secure his own attorney. Accused's expressed awareness of his own inadequacy to meet the threat to his freedom which must be defended through complicated legal proceedings involving unfamiliar and technical questions is an important circumstance. It sees the case apart from those in which the accused does not voice his need for the assistance of counsel or waives the opportunity or privilege to obtain it. *Cf. Foster* v. *Illinois, supra; Carter* v. *Illinois, supra.* This factor was given consideration in *Williams* v. *Kaiser*, 323 U. S. 471, at 474-475.

A second particular circumstance in the case at bar is that the petitioner was forced *to undergo trials* on indictments for burglary without the assistance of counsel. These trials, as is the case with many criminal procedures, involved the technical procedures, unfamiliar to the layman, which, in their simplest form, present such requirements for judgment, knowledge and experience as to impel customarily the retention of skilled counsel when the defendant is able to employ such assistance. Juries were empaneled; state's witnesses were put on the stand and examined by the state's

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attorney on direct with the usual opportunity for objections to incompetent or irrelevant testimony; the opportunity for cross-examination was presented and petitioner, from the record, attempted to cross-examine the witnesses; there was opportunity for presentation of arguments to the jury and to request the court for particular instructions; verdicts were rendered and the opportunity for appropriate motions after the verdict presented. At the outset of the trials there was opportunity for presentation of motions addressed to any defects in the indictments or pleas such as the plea of former conviction; indeed, petitioner's counsel in the preliminaries to the previous trials on indictment No. 25503 moved to quash the indictment.

Petitioner, a layman, and presumably unfamiliar with the rules of evidence and law or the Illinois procedures by which he was being tried, was left without the aid of counsel to conduct his own defense through this series of proceedings. It is submitted that these circumstances should be adjudged sufficient in a serious criminal case to require for due process the appointment of counsel when requested by the accused who has entered a plea of not guilty because of his own inability to secure counsel. It is too much to expect that in such a situation the layman's intuition and the judge's fairness, no matter how acute both may be, are likely to result in an adequate protection of the rights of the accused.

Since *Powell* v. *Alabama* not many cases have arisen which involve this particular circumstance. It is submitted that that is probably due to the fact that in most cases where a defendant enters a plea of not guilty and requests the assistance of appointed counsel, it is granted.

It must be conceded that the decision of the majority in *Betts* v. *Brady* was to deny to a party requesting appointed counsel the right to it during his trial on an indictment for

robbery. It is on this score that petitioner submits the holding of *Betts* v. *Brady* should be reconsidered and modified despite the fact that there are several distinctions from the present case which will be discussed below.

It is submitted that the fundamental feeling of the majority of the Court, as expressed in Mr. Justice Frankfurter's opinion, was that due process of law does not demand in every criminal case, whatever the circumstances, that the state must furnish counsel to an indigent defendant. The Court was concerned with the burden to which a guarantee of the right to counsel for indigents in every criminal case would place upon the states. See 316 U. S. 455 at p. 473. To modify that holding, as suggested by the facts in this case, to require the assistance of counsel where the defendant pleads not guilty to a serious crime and requests appointed counsel because he lacks the funds to secure his own attorney would avoid the consequences feared by the majority in *Betts* v. *Brady* and provide a workable interpretation of the Fourteenth Amendment for state legislatures and the courts.

Such a modification so limited would go far to meet some of the considerations voiced by Mr. Justice Black in his dissenting opinion in that case, tending to eliminate a practice which subjects men presumed to be innocent "to increased dangers of conviction merely because of their poverty." See 316 U. S. p. 476. Furthermore, such a modification would eliminate the extremely difficult burden of review of the detailed facts in every case such as the one at bar where it is necessary to determine whether the denial of assistance of counsel worked an undue hardship in the course of the trial. The very limitations of the review itself, when magnified by the inadequacies of the records such as the common law record available here, make the responsibility of the Court as assumed in *Betts* v. *Brady*

a difficult one to discharge with grave danger of injustice. Few cases of trials on "not guilty" pleas present a record where an appellate court can say "there was no question of the commission of a robbery" or where the question of guilt or innocence are so simple as in that case. Certainly the present case permits no such firm conclusions because little can be ascertained from the record of the nature of the defense, conceived or intended by the petitioner.

Finally, such a modification of *Betts* v. *Brady* would conform to the generally held conception of fairness which legislation, judicial rulings and public policy have determined to be fundamental to due process of law. Both the footnotes to the majority opinion in *Betts* v. *Brady* and the appendix to the dissenting opinion set forth statutory and case references which adequately support this assertion. (See *Betts* v. *Brady, supra,* footnotes 21-30 at pp. 468-471 and Appendix at pp. 477 et seq.)

B. *Petitioner's Second Contention*

A major factor in the holding of the majority in *Betts* v. *Brady* was its regard for the fairness of Maryland procedure. The majority opinion of Mr. Justice Frankfurter said:

> "It is quite clear that in Maryland if the procedure had been otherwise and it had appeared that the petitioner was, for any reason, at a serious disadvantage by reason of his lack of counsel, a refusal to appoint would have resulted in a reversal over a judgment of conviction.
>
> "Only recently the Court of Appeals has reversed a conviction because it was convinced on the whole record that an accused, tried without counsel, had been handicapped by the lack of representation." 316 U. S. pp. 472-473.

Also the availability of adequate facts of record in that case enabled this Court on review to determine for itself that there was no injustice to the accused resultant from his lack of counsel.

It is submitted that, in view of its recent experiences, the Court can have no such confidence in Illinois procedure. We need not explore in detail here the difficulties which have been encountered in assuring due process of law to persons imprisoned in Illinois who claim to have been deprived of their constitutional rights in the course of trial. Many pertinent observations have been set forth recently in the concurring opinion of Mr. Justice Rutledge, in which he was joined by Mr. Justice Douglas and Mr. Justice Murphy in *Marino* v. *Ragen*, No. 93, October Term, 1947. In view of the difficulties of adequate check and review of abuses by trial courts which are met under Illinois procedure, it would be fair and proper for this Court to employ a different presumption from that used in treating cases from other states where the procedures of review are not so inadequate, cumbersome and difficult. The majority of this Court in *Foster* v. *Illinois* has stated that it would only find due process wanting in those cases.

> "where the prisoner sustained a burden of proving, or was prepared to prove but was denied opportunity, that for want of benefit of counsel, an ingredient of unfairness actively operated in the process that resulted in his confinement." 332 U. S. 137.

Yet in that very case the Court was forced to leave out of its consideration claims which were "not open for consideration on the common law record which alone was before the Illinois Court." The opinion went on to say, regarding such claims,

> "they must be raised by whatever procedure Illinois may provide, or, in default of relief by appropriate

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> Illinois proceedings, by a new claim of denial of due process for want of such relief."

The concurring opinion of Mr. Justice Rutledge in *Marino* v. *Ragen*, written subsequent to *Foster* v. *Illinois*, develops the difficulties and handicaps which are encountered in utilizing the Illinois procedures.

The present case is illustrative. Petitioner felt forced to resort to the writ of error despite the fact that in such a proceeding, where there is no bill of exceptions, review is limited to the common law record. This course has severely restricted and disadvantaged the petitioner in getting the full facts and circumstances of this case before the court. A full record concerning the circumstances of the proceedings in the Trial Court or a hearing on a writ of *habeas corpus*, might have disclosed many factors which are not presented by the common law record, some of which might influence this Court to render a decision in petitioner's favor.

Where the rule of review is made to depend, as it is in this situation, upon "the circumstances of a particular situation," that rule works an injustice where the full facts can not be presented. To a suggestion that additional facts might have been put forward through a writ of *habeas corpus*, the observations on the hazards and difficulties of such a course in the concurring opinion in *Marino* v. *Ragen* are a sufficient answer at this time.

In speaking of the various remedies open to a party in Illinois, situated such as petitioner, Mr. Justice Rutledge said:

> "The Illinois scheme affords a theoretical system of remedies. In my judgment, it is hardly more than theoretical. Experience has shown beyond all doubt that, in any practical sense, the remedies available there are inadequate. Whether this is true because in fact no remedy exists, or because every remedy is so

limited as to be inadequate, or because the procedural problem of selecting the proper one is so difficult, is beside the point. If the Federal guarantee of due process in a criminal trial is to have real significance in Illinois, it is imperative that men convicted in violation of their constitutional rights have an adequate opportunity to be heard."[3]

If under these conditions, it would be both fair and appropriate for the Court to no longer require exhaustion of its present scheme of ineffective and inadequate remedies before permitting resort to the Federal District Courts sitting in Illinois, as is proposed by the concurring opinion in *Marino* v. *Ragen,* surely, it would be equally fair and appropriate to make a special application of the rule of *Powell* v. *Alabama* in Illinois cases. It is submitted that the holdings of *Betts* v. *Brady* made applicable to a Maryland case because of the court's confidence in Maryland procedures should not be applied to a case coming from the Illinois courts, where it is impossible to determine from the record that due process has been properly respected in view of the inadequacies of the record available. By ruling in this case that the proof of the denial of a request for the assistance of appointed counsel in the trial of a plea of not guilty to a charge of a serious crime is sufficient in Illinois cases to meet the test of *Powell* v. *Alabama* and *Foster* v. *Illinois,* the Court would cure the injustice done here; also, it could provide a workable rule for dealing with similar situations arising in Illinois without disturbing the adequate procedures of other states or forcing them to be "straitjacketed in this respect." *Cf. Betts* v. *Brady,* 316 U. S. 472.

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[3] See note, a Study of the Illinois Supreme Court, 15 U. of Chi. L. Rev. 107 where it was said at 128:

"The inevitable conclusion must be reached that the State of Illinois provides no satisfactory or adequate method for post-conviction hearings."

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C. *Petitioner's Third Contention*

If the Court should feel disinclined to modify its holding in *Betts* v. *Brady, supra,* in the limited particulars suggested above, it nonetheless should hold that case not to be controlling here because of certain substantial differences in the circumstances of the particular situation in that case and the case at bar.

In *Betts* v. *Bradyd, supra,* there was no trial before the jury as in these cases. In commenting on that factor, the majority opinion in *Betts* v. *Brady* remarked:

> "Such trials, as Judge Bond remarks, are much more informal than jury trials and it is obvious that the Judge can much better control the course of the trial and is in a better position to see impartial justice done than when the formalities of a jury trial are involved." 316 U. S. 472.

Also in that case this Court, on review, felt that there was a fair trial and no injustice had been done. It is doubtful whether on the limited record available here, this Court could reach the same conclusion. Little is disclosed concerning the nature of the defense or the basis for the pleas.

An even more compelling circumstance in each of these cases which was not present in *Betts* v. *Brady* and serves both to distinguish that case and bring these cases within the requirements of the test of *Foster* v. *Ill.,* was the presence in the trials on Nos. 25504 and 25506 of technical and complicated questions of law, important to the defense, for which the layman petitioner could not be considered equipped to handle. In fact, the presence of these questions is shown by the record to have reacted to the active prejudice of the defense on appeal.

As the Statement discloses in detail, some of the jurors in the trials on both indictments Nos. 25504 and 25506 for

burglary had served in the trial of the petitioner for armed robbery on indictment No. 25503. The failure of the petitioner to challenge these jurors and disqualify them or obtain a ruling over a challenge and an exception thereto was the basis of the refusal of the Supreme Court of Illinois to consider the assignment of error on that score (R. 41). Cf. Clark, Criminal Procedure, (2d Ed.) p. 521. *Swarnes Adm'x* v. *Sitton,* 58 Ill. 155.

Likewise, there was an important and highly technical circumstance arising from the fact that the indictments in Nos. 25504 and 25506 were based on the same incidents on which petitioner had been tried for armed robbery on indictments Nos. 25503 and 25505. Whether or not this gave rise to a plea of double jeopardy need not be decided here. It is sufficient to note that the Supreme Court of Illinois, in addition to discussing this assignment of error on its merits, also held that there was no merit to the contention because no bill of exceptions were filled and there was

> "no showing that a plea of former conviction was entered." (R. 39)

No such technical questions confronted the accused in conducting his own defense in *Betts v. Brady, supra.* Moreover, there are decisions of this Court since *Betts* v. *Brady,* involving similar questions, which, it is submitted, are controlling. In *Williams* v. *Kaiser,* 323 U. S. 471 this Court reversed a ruling of the Supreme Court denying writ of habeas corpus. The accused had been denied the aid of counsel at his trial on a criminal charge. There, the defendant had pleaded guilty to an indictment charging him with robbery by means of a deadly weapon and had been sentenced to a term of 15 years. The Court noted the important distinctions in the law of Missouri between various

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indictments which might have been brought in under the facts of the crime charged and said:

> "These involve technical requirements of the indictment or information, the kind of evidence required for conviction, instructions necessary to define the several elements of the crime and the various defenses which are available. These are a closed book to the average layman." 323 U. S. at 474-475.

After citing the comments in *Powell* v. *Alabama* concerning the plight of the layman charged with crime in defending himself, the opinion of Mr. Justice Douglas noted:

> "These observations are as pertinent in connection with the accused's plea as they are in the conduct of a trial." 323 U. S. 475.

It was held that the circumstances alleged there were sufficient under the rule of *Powell* v. *Alabama*. The dissenting opinion of Mr. Justice Frankfurter in that case, in which Mr. Justice Roberts joined, went to the question of the procedural propriety of overruling the Missouri Supreme Court in its denial of the writ of habeas corpus and did not challenge the majority opinion in its substantive determination recited above.

Likewise, in a companion case, *Tompkins* v. *Missouri*, 323 U. S. 485, the Court ruled that the technical differences in Missouri law between the charge of murder in the first degree, murder in the second degree, and manslaughter, justified the application of the rule in *Powell* v. *Alabama*.

No subsequent case[4] reflects upon the validity of these

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[4] Cf. *Rice* v. *Olson*, 324 U. S. 786 at pp. 789, 790 where in reversing the denial of a writ of habeas corpus because of absence of counsel, the opinion of Mr. Justice Black stressed the petitioner's need for legal counsel because the case involved a question of Federal jurisdiction "which clearly demands the counsel of experience and skill." 324 U. S. at 789.

holdings, and, indeed, they are cited in *Foster* v. *Illinois, supra,* as examples of cases where the prisoner proved or was prepared to prove

> "that for want of benefit of counsel, an ingredient of unfairness actively operated in the process that resulted in his confinement." 332 U. S. 137.

The case of *Hawk* v. *Olson, supra,* by a unanimous Court (Mr. Justice Jackson took no part), decided in 1945, is a compelling precedent. The defendant there pleaded not guilty to a charge of murder in the first degree; he alleged that he was tried and convicted after denial of his motion for continuance, with only assistance from the Public Defender who entered the case without preparation. The Court's opinion (by Mr. Justice Reed) noted that homicide in Nebraska has degrees and that "There are difficulties in the application of the rules". 326 U. S. 278. It then concluded:

> "The defendant needs counsel and counsel needs time",

holding that there was a denial of due process violative of the Fourteenth Amendment, if the allegations were proven true.

Conclusion

Finally, it would seem that the cumulative effect of the various deprivations suffered by petitioner in the course of the trials on the four indictments, taken together, was to permeate the entire proceedings in the trial court with unfairness which is not consonant with the requirements of due process of law as guaranteed to petitioner by the Fourteenth Amendment. Accordingly, the decision of the Supreme Court of Illinois should be reversed and the cause

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sent back to that court with instructions to order new trials in all four cases or such other appropriate measures as are deemed necessary to correct the injustice suffered by the petitioner.

Respectfully submitted,

HENRY H. FOWLER,
Attorney for Petitioner.

April, 1948.

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INDEX.

PAGE

Respondent's Statement of the Case 1

The Questions Presented and the Contested Issues... 4

Argument:

I. Petitioner did not raise and preserve his Federal constitutional questions in accordance with well settled and inherently reasonable rules of Illinois appellate judicature. Therefore this Court lacks jurisdiction to entertain them..... 5

II. Petitioner fails to demonstrate denial of due process 8

III. The judgments in Cases Nos. 25503 and 25505 are not assailed and should not be disturbed..... 14

Conclusion 15

Cases Cited.

Betts v. Brady, 316 U. S. 455 .....8, 10

Bute v. Illinois, October, 1947, Term, No. 398 .....8, 9, 10, 12, 13, 14

Carter v. Illinois, 329 U. S. 173 .....9, 10, 11

City of Chicago v. Peterson, 360 Ill. 177 6

City of Chicago v. Terminiello, 396 Ill. 41 ..... 6, 7

City of Chicago v. Terminiello, 332 Ill. App. 17, 74 N. E. (2d) 45 7

DeMeerleer v. Michigan, 329 U. S. 663 11

Economy Dairy Co. v. Kerner, 371 Ill. 261 .....7, 12

Foster v. Illinois, 332 U. S. 134 ..... 8, 9

Herndon v. Georgia, 295 U. S. 441 .....5, 11

House v. Mayo, 324 U. S. 42 9

Johnson v. Zerbst, 304 U. S. 458 13

Marino v. Ragen, ... U. S. ..., 68 S. Ct. 240 13
Parker v. Illinois, October, 1947, Term, No. 270 ... U. S. ..., 68 S. Ct. 708..... 5
Pennsylvania Railroad Co. v. Illinois Brick Co., 297 U. S. 447, 463 6
People v. Bird, 335 Ill. 447 6
People v. Burnett, 394 Ill. 420 .....7, 12
People v. Corbett, 387 Ill. 41 12
People v. Creviston, 396 Ill. 78 12
People v. Davies, 350 Ill. 48 6
People v. Girard, 326 Ill. 197 .....7, 12
People v. Jiras, 340 Ill. 208 6
People v. Mahoney, 364 Ill. 202 .....7, 12
People v. Orlando, 380 Ill. 107 6
People v. Phelps, 388 Ill. 618 .....7, 12
People v. Reilly, 348 Ill. 153 .....7, 12
People v. Shines, 394 Ill. 428 6
People v. Shoffner, No. 30509, not yet reported (Appendix II) 13, 29-32
People v. Thompson, 392 Ill. 589 12
People v. Van Horn, 396 Ill. 496 12
People v. Wilson, No. 30257, not yet reported (Appendix I) 13, 17-29
People v. Witt, 394 Ill. 405 6
Phelps v. Board of Appeals, 325 Ill. 625 .....7, 12
Powell v. Alabama, 287 U. S. 45 .....8, 10
Rice v. Olson, 324 U. S. 786 .....8, 10
Rooney v. Ragen, 158 Fed. (2) 346 8
White v. Ragen, 324 U. S. 760 ..... 5, 8

BLEED THROUGH – POOR COPY

STATUTES CITED.

United States Constitution, Sixth Amendment.....9, 13
United States Constitution, Fourteenth Amendment..
.....9, 10, 13
Illinois Constitution, Art. II, section 9..... 13
Illinois Revised Statutes, 1947, Ch. 38, par. 730, p. 1302 12
Illinois Revised Statutes, 1947, Ch. 110, par. 199, p. 2539 8



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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 59

DONALD LOFTUS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF OF RESPONDENT

RESPONDENT'S STATEMENT OF THE CASE.

Petitioner, who was indicted for two separate bank robberies and for two burglaries alleged to consist in the felonious entries, respectively, culminating in such bank robberies, informed the Court upon arraignment that he had counsel in Chicago who could not then be present, asked a continuance, received "temporary counsel" appointed by the Court, conferred with such counsel, and entered "tem-

porary pleas of not guilty" (R. 5, 13, 19, 25). He was thirty-four years old at the time (R. 8).

His first two trials involved, respectively, the charges of the bank robberies (R. 1-4, 9-12). On the first of these trials he was represented by one David Feldman, it not appearing certainly whether Feldman was retained by petitioner or appointed by the court, and one Johnson, who was appointed by the court to assist Feldman (R. 6). On the second trial, Feldman having telegraphed the court that he could not attend, petitioner was defended by Johnson alone (R. 14).

On each of the last two trials, Johnson asked to be excused from further service. The court offered petitioner "time in which to obtain counsel." Petitioner declined this offer, stating, not that he was without means, but that "his funds are tied up." He did not amplify this allusion to his resources, nor did he state at this time, under oath or otherwise, that he had no means to procure counsel (R. 20, 26).

The trial court stated of record in each of the last two trials that, "hearing the testimony under the circumstances of the case," was "disinclined to appoint any member of the bar as defendant's counsel owing to the circumstances in the previous cases where counsel was appointed" (R. 20, 26).

Petitioner was then tried, without representation by counsel, on the two burglary charges. The evidence in these cases was presumably substantially the same as that adduced on the robbery charges, which involved the same two holdups. Petitioner declined to examine jurors and accepted jurors who had sat either on the grand jury which returned the indictments or the first two petit juries. He did, however, examine witnesses (R. 20, 26).

Nothing indicates that petitioner's acceptance of these jurors was in ignorance of his rights; for on the second trial

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for bank robbery, which had preceded the burglary trials, when he was represented by counsel, some jurors who had been previously connected with his case were excused for cause and others were accepted (R. 14). And nothing would support an inference that the trial court did not tell him that he need not accept these jurors.

After verdicts of guilty were returned in all four cases, and before sentence, petitioner was represented by counsel. **Although post verdict motions for new trial and in arrest of judgment were made, it does not appear that the constitutional questions were raised or suggested** (R. 7, 15, 21, 27).

Failure to raise these questions in the trial court raised a *jurisdictional impediment* to their consideration by the Illinois Supreme Court on writ of error (see Argument, *post*).

Sixteen years after his conviction, petitioner sued out a writ of error to review these four judgments of conviction. As we demonstrate in the Argument, Point I, *post*, petitioner did not, except by a general allusion to the State and Federal due process clauses as invalidating the entire proceedings below, present any State or Federal constitutional question to the Illinois Supreme Court. Under well settled law of Illinois, such a generality is not sufficient to raise, present and preserve constitutional questions for review. (See Argument, *post.*) Nor did petitioner argue any of his alleged errors as violative of constitutional rights or as presenting constitutional questions. He did not set up, specially claim and thereby preserve his contention that any of the supposed errors constituted denial of due process, State or Federal.

That court, following a rule to which it and many other State courts of review have steadfastly adhered since early times (see Argument, *post*), held insufficient a generalized

invocation of the State and Federal due process clauses, without specification as to how or wherein due process was denied and without assailing on constitutional grounds either the enactment, construction or application of a State statute to which the lower court's procedure had admittedly conformed, and therefore did not consider petitioner's assignments of error as resting upon constitutional grounds. The Illinois Supreme Court did treat, discuss and decide the errors assigned by petitioner, which were numerous. But it did not, and under its well settled rules could not, view them in constitutional aspects because petitioner did not specifically present them in those aspects.

Since petitioner had counsel in his first two trials No. 25503 (R. 1-9) and No. 25505 (R. 9-17), no substantial Federal question is presented as to his conviction in those cases.

The Questions Presented and the Contested Issues.

The questions presented and the contested issues are:

1. DID PETITIONER ASSERT THE FEDERAL CONSTITUTIONAL QUESTIONS IN ACCORDANCE WITH WELL SETTLED RULES OF ILLINOIS APPELLATE PROCEDURE AND THEREBY PRESERVE THEM FOR REVIEW HERE?

2. IF PETITIONER DID EFFECTIVELY PRESERVE HIS QUESTIONS FOR REVIEW HERE, DOES THE RECORD DEMONSTRATE A DENIAL OF DUE PROCESS IN HIS CONVICTION?

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ARGUMENT.

I.

Petitioner did not raise and preserve his Federal constitutional questions in accordance with well settled and inherently reasonable rules of Illinois appellate judicature. Therefore this Court lacks jurisdiction to entertain them.

The rule that Federal questions arising in State courts must be raised and preserved in accordance with the State's principles of adjective law, including the State's rules of appellate procedure, is a limitation on this Court's jurisdiction to entertain such questions on *certiorari* to or appeal from the State court. *Herndon* v. *Georgia*, 295 U. S. 441, discussed and applied to the instant case in the margin.[1] *White* v. *Ragen*, 324 U. S. 760; *Parker* v. *Illinois*, this Term No. 270, ... U. S. ..., 68 S. Ct. 708, not yet reported.

In *White* v. *Ragen*, *supra*, this Court held that where the Illinois Supreme Court denies relief, not upon an adverse adjudication of substantive Federal constitutional questions but because such questions are not appropriately

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1 In *Herndon* v. *Georgia*, 295 U.S. 441, this Court held that it lacked jurisdiction to entertain petitioner's due process questions where petitioner, who had been convicted of seditious utterances in violation of a Georgia statute, challenged the constitutionality of the statute in the Georgia trial court only by a general assertion that it was unconstitutional, which assertion this Court recognized as an insufficient specification under the Georgia law to preserve the question for review here; and he did not challenge the constitutionality of the statute in the State Supreme Court at all until after he filed his petition for rehearing.

This Court held that the federal questions of freedom of speech, although very substantial and of great importance to the country, were not preserved in accordance with the Georgia law and therefore dismissed the case for want of jurisdiction.

Mr. Justice Cardozo dissented but only upon the ground, wholly absent here, that in his view of the case, the question of the constitutionality of the State statute did not arise until the Georgia Supreme Court's opinion in Herndon's case read the statute as dispensing with a necessity for "clear and present danger," as an element of the crime of sedition. He therefore thought that the question could not have been raised before the opinion gave occasion for petitioner's contention on application for rehearing.

asserted in that court, this Court lacks jurisdiction to review; but in such cases, neither the Illinois Supreme Court's decision nor this Court's denial of *certiorari* thereto bars access to the United States district courts on a petition for *habeas corpus*.

In *Pennsylvania Railroad Co.* v. *Illinois Brick Co.*, 297 U. S. 447, this Court, declaring itself to be without jurisdiction to consider constitutional questions not raised in an Illinois trial court as required by the Illinois procedure, said at page 463:

> "• • • As the highest court of the State declined to consider them" [i.e., Federal constitutional questions] "because not raised in the circuit court or presented to it in accordance with practice that unquestionably was well established and reasonable, this court is without jurisdiction to consider either of them.• • •"

Petitioner was attended by counsel at the time that the judgments and sentences were pronounced against him.

Illinois has steadfastly enforced in both criminal and civil cases the following rules, which are similar to the rules in many other states:

1. A mere general invocation of or address to State or Federal constitutional provisions, such as the State or Federal due process clauses, as denunciatory of the entire proceeding below, without argument of any specified constitutional questions as such, is insufficient to present any constitutional question.[2]

2. Where an action of an inferior tribunal is in accordance with a State statute as construed by the Illinois Supreme Court, such action will be upheld unless it is specially claimed that the statute is, either by its text and terms or as it is or has been construed and applied in the pending or other cases, unconstitutional.[3]

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[2] *People* v. *Witt*, 394 Ill. 405; *People* v. *Shines*, 394 Ill. 428; *People* v. *Bird*, 335 Ill. 447; *People* v. *Orlando*, 380 Ill. 107.

[3] *City of Chicago* v. *Terminiello*, 396 Ill. 41; *City of Chicago* v. *Peterson*, 360 Ill. 177; *People* v. *Jiras*, 340 Ill. 208; *People* v. *Davies*, 350 Ill. 48.

3. A plaintiff in error (or an appellant in a civil case) is not entitled to have considered, but on the contrary waives, errors assigned but not argued.[4]

4. Constitutional questions must be raised in the court below, *and the State or Federal Constitution must be invoked in that court*, or such question cannot be considered on writ of error or appeal.[5]

A very pertinent Illinois decision with respect to the requisite mode of asserting a Federal and State constitutional question is the Illinois Supreme Court's recent decision in *City of Chicago* v. *Terminiello*, 396 Ill. 41. Terminiello was convicted of a violation of a city ordinance in that, as appears by a fuller statement of the facts in *City of Chicago* v. *Terminiello*, 332 Ill. App. 17, 74 N. E. (2d) 45, he made a speech denouncing certain racial minority groups. A certificate of the trial judge is necessary to authorize a direct appeal to the Supreme Court of Illinois where the conviction is under a city ordinance (not, as in the instant case, a statute prohibiting a felony) in the absence of a constitutional question.

In deciding that Terminiello had not appropriately asserted and preserved his contention that his prosecution and conviction infringed his constitutional right of free speech, the court, after observing that appellant did not "specifically contend that the ordinance is unconstitutional," declared that a mere argument that his conviction violated due process of law did not raise a direct and specific constitutional question which gave the court jurisdiction on direct appeal; nor did it challenge the constitutionality of the enactment, construction or application of the legislative measure. The cause was transferred to the

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[4] *People* v. *Phelps*, 388 Ill. 618; *People* v. *Burnett*, 394 Ill. 420; *People* v. *Reilly*, 348 Ill. 153; *People* v. *Mahoney*, 361 Ill. 202; *People* v. *Girard*, 326 Ill. 197.

[5] *Phelps* v. *Board of Appeals*, 325 Ill. 625; *Economy Dairy Co.* v. *Kerner*, 371 Ill. 261.

Appellate Court because the constitutional question was not properly raised.

[The Illinois Supreme Court properly retained the instant case even though it deemed no constitutional question properly presented because all cases involving convictions of felonies are reviewable in the Supreme Court of Illinois on writ of error directly to the trial court, without the intermediacy of the Illinois Appellate Court, even though no constitutional question is involved. (Ill. Rev. Stats. 1947, Ch. 110, par. 199, page 2539)].

It must be borne in mind that these rules limit and inhibit the Illinois Supreme Court's power of appellate review. If petitioner in fact suffered an invasion of his Federal constitutional rights, he may apply directly to a United States District Court. *White* v. *Ragen*, 324 U. S. 760, makes this clear. (See *Rooney* v. *Ragen*, 158 Fed. (2) 346, holding that a District Court in Illinois must act by *habeas corpus* where Illinois' writ of error or other remedies are not plainly adequate.)

II.

Petitioner fails to demonstrate denial of due process.

We do not retreat from our contention that petitioner has not properly asserted and preserved his constitutional questions. (Point I, *ante.*) But supposing, for the sake of argument only, that those questions are properly here, we say that the record does not present any matter that would exempt petitioner from this Court's holding in *Betts* v. *Brady*, 316 U. S. 455, *Foster* v. *Illinois*, 332 U. S. 134, and *Bute* v. *Illinois*, this term No. 398, decided April 19, 1948, not yet reported, and assimilate it to *Powell* v. *Alabama*, 287 U. S. 45, and sequent cases.

The *Betts*, *Foster* and *Bute* cases, when compared and contrasted with *Powell* v. *Alabama*, 287 U. S. 45, *Rice* v. *Ol-*

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son, 324 U. S. 786, and kindred cases, declare that the Sixth Amendment's categorical guaranty of a right to counsel in criminal cases is not imported into the concept of due process which the Fourteenth Amendment imposes upon the States. In cases involving claimed unconstitutional denial to right to counsel in State courts, the *critique* of Federal due process is inquiry whether there is an *affirmative showing* that the failure to tender or the refusal to appoint counsel resulted in a violation of the fundamental "scheme of ordered liberty." *Bute* v. *Illinois*, this term, No. 398, *supra*, not yet reported.

At the time of his arraignment, petitioner indicated in the trial court that he had a lawyer in Chicago named Ryan. This occurred on April 9, 1932. The court did not rush him to trial in the absence of Ryan (cf. *House* v. *Mayo*, 324 U.S. 42) but continued the case until April 18, 1932 (R. 5, 13, 19, 25). In the interim, Feldman undertook petitioner's representation, fairly inferably but not certainly at the request of the court. And the trial court appointed Johnson to assist Feldman (R. 6). Although Feldman did not participate in petitioner's second trial, Johnson continued to represent him (R. 14).

Thus petitioner went through two trials with the advice of and representation by counsel.

At the commencement of the third trial, the trial court made the finding, admittedly somewhat cryptic, that, "hearing the testimony, under the circumstances of the case," it was "disinclined to appoint any member of the bar as defendant's counsel to appear as counsel in this case." Whereupon the court offered to give petitioner time to get counsel (R. 20). (It is not clear whether the "testimony" referred to was the testimony in the previous trials or upon a hearing as to petitioner's resources.)

In *Carter* v. *Illinois*, 329 U. S. 173, and in the *Foster* case, 332 U. S. 134, this Court held that, where only the common

law record alone was before the Illinois Supreme Court, refusal to appoint counsel will not be presumed to have occurred without judicial solicitude for the rights of an accused guaranteed by the Fourteenth Amendment. It adhered to this point of view in the *Bute* case, *supra*.

If it is necessary to draw reasonable and legitimate inferences, sanctioned by the *Carter* case, as to why the trial court was "disinclined to appoint any member of the bar as defendant's counsel owing to the circumstances in the previous cases where counsel was appointed" (R. 26), we may well infer that the trial judge became convinced, from his actual observations of petitioner on the witness stand, that petitioner was as able to conduct his defense as was the defendant Betts in *Betts* v. *Brady*, 316 U.S. 455. And it is by no means unreasonable to suppose that the first two trials or testimony heard by the trial court with reference to the withdrawal of court appointed counsel disclosed that petitioner had in fact means available with which to employ counsel. It is highly probable that the evidence convinced the court that the defendant was in possession of and claiming as his own large sums of money, claimed by others to be the spoils of one or both of the robberies. If so, the petitioner can not complain that the trial court disregarded his assertion of ownership of these funds. This would be true, or so at least it would seem to us, as long as petitioner persisted in affirming that the funds were his even though jurors had rejected his claims in funds to which the adverse claimants of the funds were not parties.

The *Bute* case emphasizes the distinction between capital and non-capital cases.

In such case as *Powell* v. *Alabama*, 287 U. S. 45, the circumstances were extreme. Ignorant Negro youths in a hostile community, facing death by hanging, had only the farcical appointment of "every member of the bar" to sym-

bolize, or perhaps more properly to mock and burlesque, the right to counsel. In *Rice* v. *Olson*, 324 U.S. 786, the accused's case involved an exceedingly difficult question as to whether Federal jurisdiction over the *situs* of the crime was exclusive, a question calling for highly sophisticated skill in constitutional and Federal statutory law. In *DeMeerleer* v. *Michigan*, 329 U. S. 663, this Court emphasized the youth and inexperience of a lad who, not having even consulted with a lawyer, was "hurried through unfamiliar proceedings" in a murder trial.

Neither presumption nor [illegible]y compulsory inference aids petitioner's argument here that the fact that certain jurors in the last two trials had previously served as grand or petit jurors in petitioner's earlier cases either constituted a denial of due process *per se* or demonstrated petitioner's need for counsel. It cannot be supposed that petitioner was unmindful of his right to accept these jurors. In petitioner's second trial, in which he was represented by counsel, petitioner's counsel had challenged some jurors who had sat in the first trial and accepted others. Nor can we suppose that his explicit acceptance of these jurors was without advice as to his rights from the trial court.

Petitioner has not preserved a bill of exceptions or other authenticated transcript of what happened upon his trials. This Court has consistently refused to surmise, contrary to the strong presumption that due process is afforded, that the trial court was unmindful of the constitutional rights of the defendant. In *Herndon* v. *Georgia*, 295 U.S. 441, and in *Carter* v. *Illinois*, 329 U.S. 173, this Court held that the failure to preserve a bill of exceptions made impossible and therefore prevented a review here of very substantial constitutional questions that would have been considered

had such bill of exceptions been included in the record. Since Illinois is under no federal obligation to afford appellate review at all (*Bute* v. *Illinois*, and argument, Point I, *ante*), *a fortiori* she may require a bill of exceptions, need not furnish the same *gratis*, and may make its absence a basis for denying review of matters that cannot be fully considered without such a bill. *Herndon* v. *Georgia, supra*, so holds, even where the alleged error actually appeared by the common law record but was not cognizable under the State's practice in the absence of a bill of exceptions *eo nomine*.

A writ of error is in Illinois, as it was at common law, a new suit. A plaintiff in error must, in order to avail himself of it, not only avoid express waiver or positive release of error, express or passive, but must affirmatively set up, specially claim and declare the constitutional rights which he invokes. (*People* v. *Thompson*, 392 Ill. 589.)

Tested by these well settled principles, which are not only traditional in Illinois law but are historic throughout most of the states of the Union, petitioner's writ of error in the instant case was insufficient to present and claim his alleged rights in their supposed constitutional aspects.

Illinois' "right to counsel statute" (Ill. Rev. Stats., 1947, Ch. 38, par. 730, p. 1302), as authoritatively construed by the Supreme Court of Illinois, does not require the appointment of counsel in non-capital cases unless the defendant requests such appointment and states under oath his inability to procure the same without appointment by the court. (*People v. Corbett*, 387 Ill. 41; *People* v. *Van Horn*, 396 Ill. 496; *People* v. *Creviston*, 396 Ill. 78). Petitioner did not contend either that the trial court's action was not in conformity with this statute or that the statute was, either generally or as applied in petitioner's case, unconstitutional. He made only the general assertion that he

had been denied State and Federal due process in the proceedings below.

Although he was represented by counsel after the verdicts and before sentence, the record fails to show that any denial of due process was claimed in the post-verdict motions for new trial and in arrest of judgment. Failure to raise constitutional questions below waives them (cases cited *ante*, note 6, p. 7.)

Since this Court last had occasion to consider the matter of Illinois' remedies available to Illinois prisoners claiming denial of the Federal constitutional right to counsel (*Marino v. Ragen*, ... U.S. ..., 68 S. Ct. 240, not yet officially reported, and *Bute* v. *Illinois*, this term No. 398), the Illinois Supreme Court has twice made clear its sense of obedience to this Court's exposition of Federal due process in the matter of the right to counsel. (*People* v. *Wilson*, No. 30257, decided March 18, 1948, not yet reported, reprinted in full as Appendix I, *post*, pp. 17 to 29; *People* v. *Shoffner*, No. 30509, not yet reported, and reprinted in full as Appendix II, pp. 29 to 32.)

In these cases the court states that it perceives no purely lexical difference of substance in the slightly variant verbiage of the Sixth Amendment and Illinois' constitutional guaranty of the right to counsel.[6] But the Illinois Supreme Court, consulting the history of the right to counsel in Illinois and the traditions of her jurisprudence, reads the Illinois constitution less broadly than this Court reads the Sixth Amendment in *Johnson* v. *Zerbst*, 304 U. S. 458.

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[6] Illinois Constitution of 1870, Article II, Section 9, as follows:
"In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation and to have a copy thereof, to meet the witnesses face to face, and to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

The Illinois Supreme Court reads this Court's decisions as declaring that, while the right to counsel is well nigh absolute in the Federal courts, the Federal due process clause enjoins upon States the duty to appoint counsel in those cases in which the particular context of circumstances requires such appointment in order to prevent a miscarriage of justice. This is all that the Fourteenth Amendment requires. (*Bute* v. *Illinois, supra.*)

Petitioner has failed to demonstrate that, if the whole of the record of his convictions had been preserved and presented on this record or if his right to *de novo* inquiry into the circumstances of his trial were availed of in a *habeas corpus* proceeding in a Federal district court, it would appear *first*, that he was denied the substance of due process and, *second*, that such denial was a material ingredient in his conviction.

Of course petitioner's guilt or innocence is immaterial. But the context of circumstances in which petitioner was tried are essential to the appraisal of all the facts which must precede any pronouncement that due process has been denied. That context does not appear from and is not fairly inferable from the present record.

III.

The judgments in Cases Nos. 25503 and 25505 are not assailed and should not be disturbed.

Since petitioner had counsel in his first two trials, Nos. 25503 and 25505, the writ of certiorari should be dismissed for want of any substantial Federal question or the judgments in those cases should be affirmed.

CONCLUSION

For the reasons urged in this brief, it is respectfully submitted, alternatively, that

(1) This Court should dismiss this writ of *certiorari* for want of jurisdiction resulting from the fact that the Federal constitutional questions were not properly raised and presented in the Illinois courts

or

(2) If this Court can take cognizance of the constitutional questions, it should hold that the record does not disclose a denial of due process of law.

In either case, of course, this Court's judgment should be without prejudice to petitioner's right of access to the Federal district courts by *habeas corpus* if there exist facts, not apparent here, of such exigency as to make his conviction really a denial of due process.

Respectfully submitted,

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APPENDIX I.

Docket No. 30257—Agenda 26—January, 1948.

The People of the State of Illinois, Defendant in Error, v. Henry L. Wilson, Plaintiff in Error.

MR. CHIEF JUSTICE MURPHY delivered the opinion of the court:

On June 16, 1943, plaintiff in error pleaded guilty in the circuit court of Madison County to an indictment charging grand larceny. He was sentenced to the penitentiary for the statutory indeterminate term for such offense of one to ten years. (Ill. Rev. Stat. 1947, chap. 38, par. 387.) He has sued a writ of error out of this court to have the record of his conviction reviewed. The record presented is limited to the placita, indictment, order fixing bail, recital of facts showing arraignment, and the judgment. The grounds urged for reversal are, that (1) in a criminal prosecution the court has a duty to inform the accused of his right to assistance of counsel, and (2) the failure of the court to advise the accused of his right to assistance of counsel deprives him of his liberty without due process of law.

The record shows the indictment was returned May 28, 1943, that it charged plaintiff in error and his codefendant, Alberta Louise Wilson, with having stolen various items of merchandise of a total value of $23.80. On June 16, 1943, both defendants were before the court and each was furnished with a copy of the indictment and lists of witnesses and jurors. Following the recital of such preliminaries in the record, there appears the following: "Defendant Henry Wilson is duly arraigned, says he pleads guilty and defendant Alberta Louise Wilson, by leave of court withdraws plea of not guilty and pleads guilty of said charge. Court fully advises defendants as to their respective rights and consequences, yet defendants so advised, persist in entering pleas of guilty and same so recorded by court and entered on such pleas, court finds said defendants Henry L. Wilson and Alberta Louise Wilson guilty of the crime of larceny in manner and form as charged in the indictment and the age of defendant Henry L. Wilson to be thirty-six years and the defendant Alberta Louise Wilson to be

thirty-three years and the value of the property stolen by them to be $23.80." This review is limited to the rights and interest of Henry L. Wilson.

Throughout the history of this court the fundamental law has made provision for the right of every accused to have assistance of counsel. The provisions of section 9 of article VIII of the constitution of 1818, and of section 9 of article XIII of the constitution of 1848 were identical. They were: "That in all prosecutions, the accused hath a right to be heard by himself and counsel." Section 9 of article II of the constitution of 1870 is: "In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel." It will be noted that the provision of the present constitution differs slightly in language from the two preceding constitutions, but it is the same right that was intended to be protected in each instance. It assures to every accused the right to have the assistance of counsel to advise him as to the nature of the charge preferred, of the plea to enter, and if a plea of not guilty is entered to have counsel prepare and present his defense on the trial.

The first part of section 2 of division XIII of the Criminal Code (Ill. Rev. Stat. 1947, chap. 38, par. 730,) was adopted in its present form in 1874 and has been in force continuously since that date. It provides: "Every person charged with crime shall be allowed counsel, and when he shall state upon oath that he is unable to procure counsel, the court shall assign him competent counsel, who shall conduct his defense. In all cases counsel shall have access to persons confined and shall have the right to see and consult such persons in private." In 1929, the second paragraph of the section was added. (Laws of 1929, p. 344.) Since it deals exclusively with the appointment of counsel for indigent defendants indicted for a capital offense, its provisions need not be set forth in this case.

In the one hundred thirty years that have passed since the first constitutional provision was adopted, a large number of cases have been before this court involving questions as to whether the accused's right to counsel has been transgressed upon. It is impossible within the reasonable confines of an opinion to analyze and discuss any considerable number of those cases, but, to demonstrate the care and

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caution with which an accused's right to counsel has been safeguarded, reference will be made to a few.

White v. *People,* 90 Ill. 117, decided in 1878, was a case where the trial court had restricted the time for oral argument to the jury. It was contended the limitation had deprived the defendant of having his case fully and fairly presented. It was said: "The plaintiffs in error had an undoubted right, under the very bill of rights itself, and by the law of the land, to defend by counsel, and to insist such counsel should have reasonable opportunity to discuss before the jury both the facts and the law of the case. This was a constitutional and substantial right of which no court could properly deprive them." Also see *Meredeth* v. *People,* 84 Ill. 479.

In *North* v. *People,* 139 Ill. 81, referring to the part of the criminal code above quoted, (par. 730) it was said: "We are not to assume that this (statute) was intended to be a mere empty formality, and that the counsel thus appointed should be compelled to act without being allowed reasonable time within which to understand the case and prepare the defense." See, also, *Feinberg* v. *People,* 174 Ill. 609; *People* v. *Bopp,* 279 Ill. 184; *People* v. *Brislane,* 295 Ill. 241; *People* v. *Blumenfeld,* 330 Ill. 474; *People* v. *Celmars,* 332 Ill. 113.

In *People* v. *Kurant,* 331 Ill. 470, it was said: "A privilege most important to a person accused of crime, connected with his trial, is to be defended by counsel. (Citation.) If an accused person is to have counsel he should be in a position to make a complete defense." In appointing counsel for an indigent accused, it is the duty of the court to appoint counsel that has sufficient ability and experience to fairly represent the defendant, present his defense and protect him from oppression. (*People* v. *Blevins,* 251 Ill. 381; Compare *People* v. *Laures,* 289 Ill. 490; *People V. Nitti,* 312 Ill. 73.) That an accused may be shown to be guilty does not justify the court's action in denying him an opportunity to present his defense through counsel. *People* v. *Long,* 346 Ill. 646.

Akin to the requirement that an accused shall have the right to counsel is that part of section 4 of division XIII of the Criminal Code (Ill. Rev. Stat. 1947, chap. 38, par. 732,) which provides that "In cases where the party pleads guilty such plea shall not be entered until the court shall

have fully explained to the accused the consequences of entering such plea; after which, if the party persists in pleading guilty, such plea shall be received and recorded and the court shall proceed to render judgment and execution thereon, as if he had been found guilty by a jury." In *People* v. *Kurant,* 331 Ill. 470, it was held, that, where an accused had tendered a plea of guilty under a misapprehension as to the consequences of his plea, and immediately after he had obtained the advice of counsel asked leave to change his plea, under such circumstances the request should be granted.

In *People* v. *Kawoleski,* 310 Ill. 498, defendant pleaded guilty to a violation of the Illinois Prohibition Act. He signed a jury waiver and was sentenced to jail on his plea of guilty. About twenty days thereafter, he moved to vacate the judgment and for a new trial. By affidavit filed in support of the motion, he stated that he did not understand the English language "well," that he had no counsel to represent him and was ignorant of the proceedings. The motion was denied by the trial court and on writ of error was affirmed. The substance of the holding was that defendant had not met the burden of proving that by reason of certain particular circumstances, he had not had a fair trial.

In *People* v. *Lavendowski,* 326 Ill. 173, defendant tendered a plea of guilty to violation of the liquor law. The plea was entered without the aid of counsel and, after counsel had been employed to represent the defendant, a motion was made for leave to withdraw the plea of guilty and in support thereof defendant showed that he did not understand the English language, that he did not know the effect of his plea of guilty, that he did not have counsel and that the consequences of his plea had not been explained to him. The motion was overruled and defendant was sentenced to jail. On review in this court, it was claimed that the defendant had been deprived of his constitutional right to counsel. In discussing the right of an accused to counsel, and in referring to the constitutional provision and the statutory enactment, it was said that those provisions did "not place upon the court the duty to proffer the services of counsel, but where there has been a motion for leave to withdraw a plea of guilty, the fact that the defendant

did not have counsel and was not informed that he could have such assistance, if such is a fact, is a matter which, with all the facts surrounding the case, is to be considered in determining whether it was an abuse of judicial discretion to refuse to permit the withdrawal of the defendant's plea."

The principle announced in the *Lavendowski* case had been applied in several cases prior to that time. In *Gardner* v. *People,* 106 Ill. 76, the defendant entered a plea of guilty to a charge of murder. He had no counsel, did not understand or speak the English language, the colloquy between the court and the accused being carried on through an interpreter. A few days after the plea of guilty had been entered, counsel was appointed for the accused and immediately an application was made for leave to withdraw the plea of guilty. The motion was denied by the trial court. On review, doubt was expressed as to whether the defendant understood "the difference between a charge of murder and a mere charge of taking life, or that one might be proved guilty of killing another and yet not be guilty of any offense at all, or at least of the offense of murder." It was held that, under the particular circumstances shown, leave should have been granted to withdraw the plea of guilty.

In *Krolage* v. *People,* 224 Ill. 456, the same principle was applied where the defendant had pleaded guilty to a charge of embezzlement and had been sentenced to the penitentiary. The showing was that he had misunderstood the possibility that he might be sentenced to the penitentiary.

In *People* v. *Kurant,* 331 Ill. 470, defendant entered a plea of guilty to a charge of murder. After the plea had been made, counsel was appointed, presumably to represent the defendant in the taking of testimony in aggravation or mitigation of the crime. Within a few days counsel moved to withdraw the plea of guilty and enter a plea of not guilty. The trial court denied the motion but on review it was held the circumstances under which the plea of guilty had been made, one of which was that he did not have the assistance of counsel, required the granting of the motion. (Also, see *People* v. *Varecha,* 353 Ill. 52.) An application to withdraw a plea of guilty is a matter within the sound discretion of the court but, if abused, will be reversed on review. In the following case it was held that there was no abuse of the discretion in denying the motion: *People* v. *Stamatides,* 297 Ill. 582; *People* v. *Bonheim,* 307 Ill. 316.

No case has been cited where, prior to 1944, this court passed upon a question raised on a record as is presented in this case. In that year, *People* v. *Childers*, 386 Ill. 312, came to this court by writ of error to review a common-law record. Defendant had been sentenced to the penitentiary in 1935 on a plea of guilty to an indictment charging burglary and larceny. The record was silent as to whether defendant knew prior to the entering of his plea that he had a right to counsel, and if unable to employ counsel that the court would appoint same for him. It was contended that since the record did not show that the court had advised defendant of his right to counsel and had not offered to appoint counsel, if he was unable to employ same, the judgment should be reversed. There, as in the present case, there was no claim that the accused had asked for counsel and had been denied, nor was any claim made that the defendant was not capable of understanding the nature of the charge and all the possibilities that might accompany a plea of guilty. The opinion in the *Childers* case cited the *Kawoleski* and *Lavendowski* cases with approval and adopted them as precedents for the principle that the court was not required to proffer counsel to a defendant charged with crime. The effect of such holding was that the failure of the judgment record to show such fact did not *ipso facto* destroy such judgment. Since the *Childers* case was decided there have been more than twenty cases before this court involving questions of the same general pattern presented in that case. We have consistently adhered to the principles announced in those earlier cases.

It is now earnestly contended that the principle announced in the *Childers* case, and followed in subsequent cases, should be overruled. It is argued that the constitutional provision and the statute which proclaims an accused's right to counsel are not given their full import and force unless the court, before accepting a plea of guilty, advises the accused of his right to counsel. Such contention, if sustained, would impose a duty on the court in every criminal case of advising a defendant who appeared before him without counsel of his right to counsel and to proffer him counsel to be appointed by the court, if he was not able to employ same.

The important bearing such question has on the fundamental rights of an accused and the frequency with which

the question arises has prompted us to re-examine our earlier decisions and to reconsider the whole question in the light of certain recent decisions of the Supreme Court of the United States which define the requirements of due process under the fourteenth amendment as applied to persons incarcerated under a record such as the one before us.

Plaintiff in error contends for an interpretation and application of section 9 of article II of the constitution and section 2 of division XIII of the Criminal Code which will accord with the construction the Federal courts have given the sixth amendment to the Federal constitution. The pertinent parts of that amendment are that "In all criminal prosecutions the accused shall enjoy the right * * * to have the assistance of counsel for his defense." In *Johnson V. Zerbst*, 304 U. S. 458, 82 L. ed. 1461, it was said: "The sixth amendment withholds from Federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life and liberty unless he has or waives the assistance of counsel."

It has long been considered that the first ten amendments to the Federal constitution impose a limitation on Federal legislative and judicial power and that the provisions of such amendments have no effect on States or State courts, (*Spies* v. *Illinois*, 123 U. S. 131, 31 L. ed. 80; *Keith* v. *Henkleman*, 173 Ill. 137,) except insofar as those rights and privileges are within the requirement of the due-process clause of the fourteenth amendment or, as said in *Palko* v. *Connecticut*, 302 U. S. 319, 82 L. ed. 288, "as were implicit in the concept of ordered liberty." Unless the requirements of the sixth amendment are eventually to be declared an essential of due process under the fourteenth amendment (see dissent in *Adamson* v. *California*, 332 U. S. 46, 91 L. ed. 1464,) and thereby binding on the States, the State constitutional provision may be construed without regard to the influence of the construction given the sixth amendment by the Federal courts

The language of section 9 of article II and of the sixth amendment safeguard the same right. There is no difference in language which would support a conclusion that the right of an accused to counsel was of any greater extent under one provision than the other. We find that the difference in the conclusions reached by this court in the State pro-

vision and the Federal court on the sixth amendment is more a matter of approach than on any difference in the language of the two provisions.

The rationale of the holdings of this court on the right of an accused to counsel under the State provision is that it is assumed an average accused knows of his rights to counsel and of his right to have counsel appointed for him if he is unable to procure his own. Experience, based on observation and practice, shows that the average person in the every day affairs of life, when apprehended for a criminal offense or when his rights become involved in a civil action, resorts to counsel without having to be told of his right to counsel. Acting on such assumption, this court has held that the burden of asserting the right to counsel rests on the accused and, in that sense, it is said in many of the cases that the right of counsel is a right personal to a defendant which he may waive or claim as he himself elects. (*People* v. *Carter,* 398 Ill. 336; *People* v. *Foster,* 394 Ill. 194; *People* v. *Pond,* 390 Ill. 237.) Recognizing the exceptions, it has been held that where it was shown that an accused had, by reason of his lack of understanding of his rights, including the right to counsel, adopted a course detrimental to his case, such ill-advised action should be stricken from the record and the accused given the right to counsel and to proceed with the advice and assistance of counsel. (See *People* v. *Kurant,* 331 Ill. 470; *Krolage* v. *People,* 224 Ill. 456, and *Gardner* v. *People,* 106 Ill. 76.) As a rule, the question has arisen on a motion or petition of the defendant, supported by proof showing his lack of understanding of his right to counsel. If a court has any doubt as to the mental competency of the accused to understand his rights, then due process would require that the court, on its own motion, advise him as to his right and inform him that if he was not able to procure counsel the court would appoint counsel for him.

In applying the sixth amendment, the Federal courts do not indulge the assumption of competency of the average accused that has been applied by this court. It is tersely stated in *Johnson* v. *Zerbst,* 304 U. S. 458, 82 L. ed. 1461, in the following language: "It (sixth amendment) embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to pro-

tect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." We indulge the same assumption as to the competency of an accused to defend himself but the question raised on this record does not go to plaintiff in error's competency to conduct a defense but is limited to plaintiff in error's knowledge of his right to have the advice and assistance of counsel. There is not a word in the record tending to show that plaintiff in error did not know that he had a right to have the advice of counsel before pleading in the case. It is a well-established principle that all reasonable intendments not contradicted by the record are to be taken in favor of the validity of the judgment, (*People* v. *Throop*, 359 Ill. 354; *People* v. *Gerke*, 332 Ill. 583), and that he who seeks a reversal of a judgment assumes the burden of showing the illegality of the proceeding which resulted in the judgment against him.

Counsel for plaintiff in error envisions a warning in the opinion of *Foster* v. *Illinois*, 332 U. S. 134, 91 L. ed. 1542, wherein the court says: "It is not for us to suggest that it might be desirable to offer to every accused who desires to plead guilty the opportunities for counsel and to enter with formality upon the record the deliberate disclaimer of his need for counsel because of a full appreciation of the meaning of a plea of guilty as expounded by responsible judges." We consider such statement, not in the sense of a warning of a future determination if the State law were not changed, but rather to emphasize the difference between State and Federal questions. We think the succeeding sentence supports this interpretation, where it is said: "Our duty does not go beyond safeguarding 'rights essential to a fair hearing' by the States."

We hold that under the State constitution and section 2 of division XIII of the Criminal Code, there was no duty resting upon the court to advise plaintiff in error of his right to counsel before he entered his plea of guilty, and that the absence from the judgment of the explanation of such right to plaintiff in error does not furnish grounds for reversal. This we believe to be in accord with cases in other jurisdictions having constitutional or statutory provisions similar to ours. (See Annotation in 149 A. L. R. 1403.) We adhere to the principles announced in *People* v.

Childers, 386 Ill. 312, and other cases. As a question of State law, the judgment should be affirmed.

The fourteenth amendment to the Federal constitution is a limitation on the exercise of power by State legislatures and State courts, and it is the duty of a State court to enforce the requirements of that amendment. Questions as to whether plaintiff in error had due process within the meaning of the fourteenth amendment are within the scope of the error assigned in this case. The decisions of the Supreme Court of the United States as to what constitutes due process under the fourteenth amendment control and our discussion now relates to that field.

In *Foster* v. *Illinois,* 332 U. S. 134, 91 L. ed. 1542, the Supreme Court of the United States says that the rationale of the present day application of due process was first expounded in *Powell* v. *Alabama,* 287 U. S. 45, 77 L. ed. 158. In the *Powell* case it was said: "Where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law." To illustrate the necessity of an incompetent accused having a full understanding as to his rights of counsel, it was said in the *Powell* case: "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissable. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceeding against him. Without it, although he is not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true it is of the ignorant and illiterate, or those of feeble intellect."

Assuming that *Powell* v. *Alabama,* 287 U. S. 45, 77 L. ed. 158, embodies the scope of the doctrine of due process as

applied to an accused's right to counsel, we pass to the next problem as to how the Federal court applies that doctrine to a case such as this. *Foster* v. *Illinois,* 332 U. S. 134, 91 L. ed. 1542, furnishes the answer. When that case was before this court on writ of error, (394 Ill. 194,) we affirmed a judgment which, as here, contained a general recital that the defendants had been apprised of their rights and the effect and consequences of a plea of guilty, but it did not contain any specific recital as to the right to counsel. The Supreme Court of the United States, commenting on such fact said: "In this case there is neither proof nor uncontradicted allegation of any such (referring to *Williams* v. *Kaiser,* 323 U. S. 471, 89 L. ed. 398; *Tomkins* v. *Missouri,* 323 U. S. 483, 89 L. ed. 407; *De Meerleer* v. *Michigan,* 329 U. S. 663, 91 L. ed. 471; *Haley* v. *Ohio,* U. S. , 92 L. ed. 239) miscarriage of justice in accepting pleas of guilty. The record of the proceeding plainly imports an observance of due process * * *. There was nothing in the common-law record, on the basis of which the Supreme Court of Illinois rendered its decision, to contradict this account of the proceedings in 1935 (date of sentence.) We thus have in effect the bald claim that merely because the record does not disclose an offer of counsel to a defendant upon a plea of guilty, although the court before accepting the plea duly advised of his 'rights of trial' and the consequences of such a plea, he is 'deprived of rights essential to a fair hearing under the Federal Constitution.' *De Meerleer* v. *Michigan,* 329 U. S. 663, 91 L. ed. 471. We reject such a claim. Most incarcerations are upon pleas of guilty, and probably most such pleas have been made without the felt need of counsel * * *. Our duty does not go beyond safeguarding 'rights essential to a fair hearing' by the States."

The prior decisions of this court, which plaintiff in error earnestly contends are founded on a wrong principle and should be overruled, are, on the records presented, in accord with *Powell* v. *Alabama,* 287 U. S. 45, 77 L. ed. 158; *Betts* v. *Brady,* 316 U. S. 455, 86 L. ed. 1595, and *Foster* v. *Illinois,* 332 U. S. 134, 91 L. ed. 1542, and there is nothing on the record in this case which would justify a reversal of the judgment of conviction on the ground that plaintiff in error had been denied due process of law by not advising him of his right to counsel before accepting his plea of guilty.

Before concluding this case, reference should be made to the general inclination of defendants, who bring their cases to this court by writ of error to review questions of due process under the fourteenth amendment, to rely upon decisions of the United States rendered in review of *habeas corpus* proceedings. Analysis of the *habeas corpus* cases shows that the charge that the accused had been denied due process of law was raised in the trial court by allegations in a sworn petition. Reference to two cases (*Williams* v. *Kaiser*, 323 U. S. 471, 89 L. ed. 398; *Tomkins* v. *Missouri*, 323 U. S. 485, 89 L. ed. 398,) will suffice. In the *Williams* case, the allegations in the petition for writ of *habeas corpus* was: "Prior to his conviction and sentence as aforesaid, the petitioner requested the aid of counsel. At the time of his conviction and sentence, as aforesaid, the petitioner was without the aid of counsel, the Court did not make an appointment of counsel, nor did petitioner waive his constitutional right to the aid of counsel, and he was incapable adequately of making his own defense, in consequence of which he was compelled to plead guilty." The allegation in the petition in the *Tomkins* case was: "The petitioner states that in the proceedings in said circuit court • • • he was not represented by counsel, the court did not make an effective appointment of counsel, the petitioner did not waive his constitutional right to the aid of counsel, and he was ignorant of his right to demand counsel in his behalf, and he was incapable adequately of making his own defense." The lower court, and the court of last resort of the State from which those cases came, had held that the allegations of the respective petitions were not sufficient to require an answer and dismissed or denied the petition without requiring an answer or denial of the charge. The Supreme Court of the United States held that such allegations brought the cases within the doctrine of *Powell* v. *Alabama*, 287 U. S. 45, 77 L. ed. 158, and were sufficient to raise a question of fact as to whether the petitioner had been denied due process of law by reason of having not been capable of understanding his right to counsel and not having the right explained to him. Each of the cases was remanded, with directions to require an answer and take evidence, if a question of fact was raised. It will be observed that the court restricted its conclusions to the allegations of the petition and found them sufficient to require an answer and

evidence, which they said might result in showing that the claim or denial of due process was without foundation. The issue presented on a petition for writ of *habeas corpus* containing allegations in accordance with the doctrine of *Powell* v. *Alabama*, 287 U. S. 45, 77 L. ed. 158, is entirely different from the one presented on the record furnished in this case.

What has been said herein in reference to the constitutional provision and section 2 of division XIII of the Criminal Code applies to noncapital cases. The second subdivision of said section 2, which was added by the amendment of 1929, pertains solely to capital cases and contains a different requirement. See *People* v. *Williams*, No. 30371.

The judgment of the circuit court of Madison County is affirmed.

JUDGMENT AFFIRMED.

APPENDIX II.

Docket No. 30509—Agenda 40—January, 1948.

The People of the State of Illinois, Defendant in error, v. Clarence Shoffner, Plaintiff in Error.

Per Curiam: An indictment returned in the circuit court of Ford County on April 8, 1931, charged that plaintiff in error did, on January 19, 1931, break and enter a store building with the intent to steal, and did take and carry away certain items of personal property having an aggregate value of $10.50. Bail was fixed at $1500 but the record does not disclose whether bail was given or whether plaintiff in error remained in custody. It does appear that on July 18, 1931, he was before the court and acknowledged receipt of a copy of the indictment, list of witnesses and a list of the petit jurors. The judgment contains the following:

"And now in open court the defendant waives arraignment, and states to the Court that he desires to plead guilty to the Crime of Burglary in manner and form as alleged in said indictment.

"And now the defendant after being admonished by the court as to the effect and consequence of his said plea of

guilty, still persists in his said plea of guilty to the crime of Burglary in manner and form as alleged in said indictment, and the defendant states his age to be 25 years.

"It is therefore the order and judgment of this court that the defendant upon his said plea of guilty stand convicted of the crime of Burglary in manner and form as alleged in said indictment and the court finds the age of the defendant to be 25 years."

The judgment concludes with an order sentencing plaintiff in error to the penitentiary for a period of one year to life. In 1947 leave was granted plaintiff in error to prosecute a writ of error forma paperis, and in December, 1947, an authenticated copy of the common-law record was filed in this court. Two errors are assigned for reversal: first, that there was no arraignment, and without such the judgment can not be sustained; second, that plaintiff in error did not have counsel to advise him, that he did not know of his right to counsel, that the court did not advise him of such right, and that he entered his plea without a full understanding of his rights.

The formalities of arraignment as required by the common-law have been changed by section 1 of division XIII of the Criminal Code. (Ill. Rev. Stat. 1947, chap. 38, par. 729.) Where it was formerly required that the indictment be read to the accused, the statute now provides that he be furnished with a copy of the same. It has been said that the furnishing of a copy of the indictment is a better means of informing the accused of the character of the charge than was the former requirement that it be read to him. (*People* v. *Terry*, 366 Ill. 520; *Kelly* v. *People*, 132 Ill. 363.) If the record shows that what was done amounted in substance to an arraignment, it is sufficient. (*Parkinson* v. *People*, 135 Ill. 401.) However, if a case is to be tried before a judge or jury, there must be a plea, for in the absence of same no issue is raised. If the accused pleads guilty, the record must show such plea, for without it a judgment of conviction cannot be sustained. *Hoskins* v. *People*, 84 Ill. 87; *Yundt* v. *People*, 65 Ill. 372; *Johnson* v. *People*, 22 Ill. 314.

It will be observed that the record shows plaintiff in error acknowledged to the court that he had received a copy of the indictment and thereafter entered a plea of guilty. Plaintiff in error contends the words "waives arraignment"

constitutes a waiver of all the essentials of an arraignment, but the recital of the furnishing of a copy of the indictment shows this requirement was not waived nor was the requirement that the record show a plea was entered. These facts appearing of record it is not a case as plaintiff in error contends where the record shows arraignment was waived, but is a case presenting a question as to whether the facts shown are sufficient to amount to an arraignment. We hold that what was done amounted to an arraignment, notwithstanding the recital "arraignment waived." *People* v. *Terry*, 366 Ill. 520.

In discussing the essentials of an arraignment to meet the due-process clause of the fourteenth amendment, it was held in the Terry case that due process of law did not require the people to adopt any particular technical form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself. *Garland* v. *State of Washington*, 232 U. S. 642, 58 L. ed. 772.

The second assignment of error raises the same question determined in *People* v. *Wilson*, No. 30257, in which an opinion was filed this term. On a review by writ of error, the reviewing court is restricted in its examination to the record certified by the trial court. Such record imports verity, and all reasonable intendments not contradicted by the record are to be taken in favor of the validity of the judgment. (*People* v. *Throop*, 359 Ill. 354; *People* v. *Gerke*, 332 Ill. 583.) The rule is that court records, the subject of review as in this case, are to be regarded as so conclusive and final that the existence of the record or the facts recited therein can not be impeached or contradicted by the affidavits of persons, either parties to the record or bystanders, or by notes of a stenographer who reported the proceedings in the trial court, or on the memory of the judge who presided when the record was made. (*People* v. *Flannigan*, 398 Ill. 55; *People* v. *Ambolo*, 343 Ill. 480; *Hubbard* v. *People*, 197 Ill. 15.) This rule precludes our consideration of plaintiff in error's affidavit filed in support of his second assignment of error. Without it the questions presented on this assignment are the same as those presented in *People* v. *Wilson*, No. 30257.

Reference should be made to plaintiff in error's affidavit, for it furnishes an opportunity to again emphasize the dis-

tinction plainly drawn by the cases between questions reviewable on a writ of error and questions of fact that may be tried on a petition for a writ of *habeas corpus* where it is claimed due process has been denied. Plaintiff in error states in his affidavit that he was 26 years of age in 1931 when arrested for this offense, that he was born in a rural section of Kentucky, never had "a systematic schooling" and could not read or write when he pleaded guilty in 1931. He states that during his incarceration he has improved his condition and is now able to read and to understand the affidavit. It was further stated that by reason of his illiteracy when he pleaded guilty he was not able to read the indictment or to know its contents, that he did not have counsel, did not know he had a right to counsel and did not have any money to employ counsel if he had known of such right, that the court did not advise him of his rights, or that counsel would be appointed for him if he requested it. The affidavit concludes that "he was incapable adequately of making his own defense." It is obvious the affidavit was drawn with a view of bringing the case within the doctrine of *Powell* v. *Alabama*, 287 U. S. 45, 77 L. ed. 158, followed in more recent cases including *Williams* v. *Kaiser*, 323 U. S. 471, 89 L. ed. 398, and *Tomkins* v. *Missouri*, 323 U. S. 483, 89 L. ed. 407. The affidavit contains substantially the same facts as were alleged in the petitions for writs of *habeas corpus* in the *Williams* and *Tomkins* cases. The Supreme Court of the United States held that such averments, if proved, were within the doctrine of *Powell* v. *Alabama*, and, being such, required an answer and, if questions of fact were raised, the introduction of evidence. As stated, the affidavit is not available to impeach the record in this review.

For the reasons assigned, the judgment is affirmed.

JUDGMENT AFFIRMED.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 59

DONALD LOFTUS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

MOTION, ALTERNATIVELY PRESENTED AS AN ADDENDUM TO THE BRIEFS AND ARGUMENTS UPON WHICH THIS CASE HAS BEEN TAKEN, TO DISMISS THE WRIT OF CERTIORARI IN VIEW OF THE ILLINOIS SUPREME COURT'S ANNOUNCEMENT OF SEPTEMBER 21, 1948.

On September 21, 1948, the Supreme Court of Illinois, pursuant to this Court's announcement in this case (334 U. S. 804) made an announcement in the nature of a further opinion in this case. A copy of the full text of that announcement is appended hereto and marked Appendix I.

That announcement leaves no doubt that the Illinois Supreme Court's affirmance of petitioner's conviction imported no more than that court's holding that

1. The errors of which petitioner complained could not be raised upon the naked common law record then before the court.

2. But affirmance on writ of error was without prejudice to petitioner's right to assert his substantive contentions of denial of due process upon Illinois' writ of *habeas corpus*, which the Supreme Court of Illinois declares appropriate and adequate in petitioner's case.

Excerpts from the Illinois Stupreme Court's announcement make this clear:

> "In the instant case the contention of the plaintiff in error is that under the particular circumstances the could should have appointed counsel to defend him. If the circumstances are such as to merit such duty, and the court failed in that duty, the Supreme Court of the United States has held the judgment is void for lack of due process of law. (*House* v. *Mayo*, 324 U. S. 42, 89 L. ed. 739; *Rice* v. *Olson*, 324 U. S. 786, 89 L. ed. 1367.) The constitution of the United States and the decisions of the United States Supreme Court are the supreme law of the land, binding up every court in the land. **But, to reach this question it is necessary that a petition bring forth facts, which can be heard and tried by the court, to determine whether or not the particular facts in the case justified the claim of the plaintiff in error.**
>
> "But the United States Supreme Court also makes it clear that where the record on review leaves it to conjecture whether the accused's circumstances were of such special exigency as to require counsel in a non-capital case, the State Supreme Court or other reviewing court may properly refuse to decide a question that, upon the record before it, it cannot decide; and it may leave the accused to such remedy, whether by way of *habeas corpus, coram nobis* proceeding under a rule of court, or otherwise, as is appropriate under the State's system of procedure. The opinion in *Carter* v. *Illinois*, 329 U. S. 173, 91 L. ed. 172, affirmed this court's judgment in *People* v. *Carter*, 391 Ill. 594, on

the ground that, although the defendant's claim that he was unconstitutionally denied counsel at the time of his arraignment raised a federal question, this court was justified in refusing to entertain that question on a record insufficient to present all of the relevant facts.

"In the instant case it does appear from the record that the defendant stated that 'his funds were tied up' and that the court denied his unsworn request for counsel after stating that because of circumstances in the previous cases he was disinclined to appoint counsel, which reasons are not preserved in the record. We therefore cannot say, **upon the record now before us**, whether there is merit in defendant's claim of Federal constitutional right; for the trial court may or may not have had ample reason, grounded in matter not apparent in the record, for not appointing counsel.

"It is obvious that the writ of error *coram nobis* has no application. That must be addressed to the trial court, and if the trial court finds there was some mistake of fact not shown; which would have required a different judgment, such court may allow the writ, set aside the conviction, and supply the defect. It is apparent this writ could not apply here because all the facts appear to be known.

"From a consideration of the scope of the several remedies allowed in Illinois to a person convicted of crime, it is clear that the error claimed in the failure of the trial court to appoint counsel is not presented so as to be allowed upon writ of error, as it does not sufficiently appear from the record that any rights of the defendant to counsel were refused by the court. Nor did the defendant show by bill of exceptions that he made any proper application to the court requiring the appointment of counsel under the Illinois statute, so as to comply with due process.

"**To be precise, the position of the court is that the contention of the plaintiff in error cannot be allowed because the record he has tendered does not present a question for our consideration on writ of error.**" (Emphasis supplied.)

This opinion states in clear terms that either the circuit court of the county in which petitioner was convicted or

the circuit court of the county in which he is now incarcerated must entertain upon its writ of *habeas corpus* his charges based on matters *dehors* the common law record, of denial of due process in the mater of his trials and convictions.

The presently standing announcement of the Illinois Supreme Court shows that that Court is fully sensible of Illinois' obligation in the matter of counsel for an accused under the Due Process Clause of the Fourteenth Amendment as expounded by this Court. The announcement also makes clear the Illinois Supreme Court's recognition that it need not entertain Federal questions upon a common law record inadequate to present them and that it may remit the petitioner to appropriate remedies in the state courts.

In *Carter* v. *Illinois*, 329 U. S. 173, this Court held that, while state courts must or federal courts will "give one whom it" [the State] "deprives of his freedom the opportunity to open an inquiry into the intrinsic fairness of a criminal process even though it appears proper on the surface", denial of due process need not be inferred from a common law record inadequate fully to present all relevant facts.

It is significant that Justices Douglas, Black and Rutledge, although they dissented in the *Carter* case, said (329 U. S. 180):

> "If, as the opinion of the Court suggests, the Illinois Supreme Court had ruled that petitioner could not raise the question of his right to counsel by reason of the abbreviated common law record, I would agree that the judgment should be affirmed. For then petitioner would be remitted to other state procedures for vindication of his constitutional right. • • • "

In the instant case, the Supreme Court of Illinois has ruled that petitioner could not, to borrow and apply the language of Mr. Justice Douglas in the dissent in the

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Carter case, "raise the question of his right to counsel by reason of the abbreviated common law record" and has made it clear that petitioner is "remitted to other state procedures for vindication of his constitutional right."

For these reasons we respectfully submit that this Court lacks jurisdiction to review this case upon its instant writ of *certiorari* and should therefore dismiss the same.

In conclusion, we observe that if petitioner has heretofore unsuccessfully sought *habeas corpus* in Illinois courts upon the contentions of fact which he seeks, but without basis in the record, to assert here, denials of his petition for *habeas corpus* will not prevent the prompt issuance of a new writ by Illinois' circuit courts; for the principle of *res judicata* is not applicable to *habeas corpus* in Illinois (*People* v. *McAnally,* 221 Ill. 66); and the Illinois Supreme Court's presently standing opinion is a clear command to Illinois circuit courts having jurisdiction of petitioner's person, namely, the court in which he was convicted or the court of the county where he is incarcerated, to grant him a writ of *habeas corpus.*

Suggestion that If This Court Perceives Further Questions In this Case, It Set the Cause for Reargument.

The Attorney General respectfully suggests that if the presently standing announcement leaves this Court in any measure of doubt as to the disposition that it should make of this cause, it should, in view of the great importance of this case in the jurisprudence of Illinois and other states, set this cause for reargument.

Respectfully submitted,

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208 South La Salle St., Chicago 4, Ill.
Attorney for Respondent.

WILLIAM C. WINES,
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Of Counsel.

APPENDIX I.

No. 29620—Adv. 68.

People State of Illinois, defendant in error, vs. Donald Loftus, plaintiff in error.

The following per curiam announcement is made pursuant to the suggestion of the United States Supreme Court on June 14, 1948, in cause No. 59, October Term 1947, which is to be filed with the Clerk in said cause:

Donald Loftus, defendant, was convicted in the circuit court of McHenry County, Illinois, on four indictments, two for armed robbery, and two for burglary. On writ of error the judgments of conviction were affirmed in 395 Ill. 479. Defendant applied for *certiorari* to the Supreme Court of the United States, which was allowed, and on June 14, 1948, said court made an announcement in Cause No. 59 to the October term, 1947, of said court, the purport of which amounts to an inquiry as to the correct Illinois practice as to the manner in which lack of due process of law under the fourteenth amendment may be raised in courts of appellate jurisdiction, reviewing a conviction shown only by the common-law record.

The particular lack of due process in the present case is claimed to arise from a failure of the trial court to appoint counsel to defend plaintiff in error. The inquiry of the court requires an expansion of the opinion originally rendered, and an examination of the general modes afforded by the Illinois law to test the validity of the conviction of a criminal offense.

In general three methods are provided: (1) review by writ of error, which is allowed in all felony cases, to the Supreme Court; (2) by petition for writ of *habeas corpus;* and, (3) by the application for a writ of error *coram nobis,* or, as it is now designated, a motion under section 72 of the Civil Practice Act. And each of these methods has a distinct application, depending upon the circumstances of each particular case.

A writ of error is of ancient origin, and tests the record

made in the case by the trial court. The record in the trial court may consist only of the mandatory record, *viz.*, indictment, arraignment, plea, trial and judgment. (*Cullen* v. *Stevens*, 389 Ill. 35.) This appears in the clerk's record in every case, whether there is a plea of guilty or a trial. The record may include also a bill of exceptions, which consists of all of the motions and rulings of the trial court, evidence heard, instructions, and other matters which do not come directly within the clerk's mandatory record. This may be only a part of the record on review when a bill of exceptions is prayed and allowed, and certified by the court. When this is done the record consists of all proceedings in the case from the time of the convening of the court until the termination of the trial. In the instant case the record consists of the mandatory proceedings only.

The statute provides also that it is the duty of the court to appoint counsel for the accused when he states upon oath that he is unable to procure counsel. (Ill. Rev. Stat. 1947, chap. 38, par. 730.) To this provision the exception is that in capital cases it is mandatory for the court to appoint counsel. Therefore, when the review is had upon the common-law record, the sole matter only that may be considered by the court is error appearing upon the face of the record, and matters may not be added by argument, affidavit, or otherwise, to supply or expand the record. The case must stand or fall upon the errors appearing in the record. Of course, where there is a bill of exceptions, which includes motions, evidence, rulings on evidence, instructions, and the like, and such bill of exceptions is made a part of the record, errors may be reached by the remedy of writ of error. No bill of exceptions was saved in the present case.

The second method of reviewing a conviction of a crime, where the prisoner is under confinement, is by application for writ of *habeas corpus*. A number of grounds for the issuance of such a writ may be found in chapter 65 of the Illinois Statutes, but the sole pertinent ground here would be confinement in the penitentiary under a judgment of conviction which is void. Such ground has been frequently upheld by Illinois law, (*People ex rel. Georgetown* v. *Murphy*, 202 Ill. 93; *People ex rel. McGee* v. *Hill*, 350 Ill. 129; *People ex rel. Maglori* v. *Siman*, 284 Ill. 28; *People ex rel. Melton* v. *Whitman*, 243 Ill. 471,) and by the Supreme Court

of the United States. *House* v. *Mayo*, 324 U. S. 42, 89 L. ed. 739; *Rice* v. *Olson*, 324 U. S. 786, 89 L. ed. 1367.

The petition for writ of *habeas corpus* may be filed originally in the Supreme Court. The usual procedure has been to form an issue of law by demurrer, or motion to strike the petition, or like action, directly to the return of the officer. In either event the demurrer admits the matter well pleaded, and thus, either the facts of the petition or the return being admitted, the question of law is presented. The issues of fact cannot be determined in the Supreme Court because the law does not afford a means for the court to take testimony, so recourse must be had to the appointment of a commissioner, although no method for compensation for such commissioner has been provided by law. This omission for hearing evidence on *habeas corpus* in the Supreme Court is compensated for partially by granting original jurisdiction to the circuit courts to hear *habeas corpus* cases upon petition, and to hear evidence, and the judgment of such circuit court is a final order, but is not appealable to the Supreme Court of the State, except in extradition cases. No *habeas corpus* can operate as a writ of error. *People ex rel. Morris* v. *Hazard*, 356 Ill. 448; *People ex rel. Thompson* v. *Nierstheimer, Warden*, 395 Ill. 572.

The third method of review is commonly designated as writ of error *coram nobis*, although now referred to as a motion, in section 72 of the Civil Practice Act. (Ill. Rev. Stat. 1947, chap. 110, par. 196.) The procedure is an ancient one, and was a process at common law used for the purpose of correcting errors of fact occurring in the trial court, which facts, if known to the court, would have resulted in a different judgment. The errors sufficient for the issuance of such writ have been cited many times, and generally included death of one of the parties prior to the judgment, infancy, coverture, insanity, fraud in procuring jurisdiction, etc. (*People* v. *Gleitsman*, 396 Ill. 499.) From the earliest time the writ has been used in Illinois, for we find a reference to it in *Sloo* v. *State Bank of Illinois*, 1 Scam. 428, where it is declared to be a settled remedy to correct mistakes of fact; and as late as *Schoers* v. *People*, 399 Ill. 428, when it was used where the evidence tended to show the accused was insane at the time of his conviction,

a fact which was unknown to the trial court, and had it been known a different result would have followed.

We do not see any great complexity in the application of these various remedies to different states of facts which may occasion their use. A writ of error searches the record as it is made in court, without any aid of extrinsic circumstances. Thus, if there is but a common-law record, nothing but what is contained in the common-law record may be examined. If the common-law record is supplemented by a bill of exceptions, so that the entire trial proceeding is recorded, any error shown by the complete record may be reached by a writ of error. *Habeas corpus* is applicable to a situation, among others, where the judgment is void by reason of matters not appearing in the record. The claims of the petitioner must be presented to the court, whether the circuit or supreme, by a proper petition showing facts which, if true, would render the judgment void. The writ of error *coram nobis* applies to the relief which would be afforded because of matters which, if known, would have changed the result, and hence is largely a matter for the trial court only.

But in any event, this court's jurisdiction on writ of error, as distinguished from its jurisdiction or that of a lower court on *habeas corpus*, and as distinguished from that of a trial court on proceedings in the nature of writ of error *coram nobis*, is confined to a scrutiny of matters appearing upon the record made by the lower court, with or without a bill of exceptions, as the case may be. (*People* v. *Carter*, 391 Ill. 594, and affirmed sub. nom. *Carter* v. *Illinois*, 329 U. S. 173, 91 L. ed. 172, and many other cases.) This is, of course, the general rule in State and United States courts of review where the procedure is by writ of error or appeal. *Claassen* v. *United States*, 142 U. S. 140, 35 L. ed. 966.

In the instant case the contention of the plaintiff in error is that under the particular circumstances the court should have appointed counsel to defend him. If the circumstances are such as to merit such duty, and the court failed in that duty, the Supreme Court of the United States has held the judgment is void for lack of due process of law. (*House* v. *Mayo*, 324 U. S. 42, 89 L. ed. 739; *Rice* v. *Olson*, 324 U. S. 786, 89 L. ed. 1367.) The constitution of the United States and the decisions of the United States Supreme

Court are the supreme law of the land, binding up every court in the land. But, to reach this question it is necessary that a petition bring forth facts, which can be heard and tried by the court, to determine whether or not the particular facts in the case justified the claim of the plaintiff in error.

But the United States Supreme Court also makes it clear that where the record on review leaves it to conjecture whether the accused's circumstances were of such special exigency as to require counsel in a noncapital case, the State Supreme Court or other reviewing court may properly refuse to decide a question that, upon the record before it, it cannot decide; and it may leave the accused to such remedy, whether by way of *habeas corpus, coram nobis* proceeding under a rule of court, or otherwise, as is appropriate under the State's system of procedure. The opinion in *Carter* v. *Illinois,* 329 U. S. 173, 91 L. ed. 172, affirmed this court's judgment in *People* v. *Carter,* 391 Ill. 594, on the ground that, although the defendant's claim that he was unconstitutionally denied counsel at the time of his arraignment raised a federal question, this court was justified in refusing to entertain that question on a record insufficient to present all of the relevant facts.

In the instant case it does appear from the record that the defendant stated that "his funds were tied up" and that the court denied his unsworn request for counsel after stating that because of circumstances in the previous cases he was disinclined to appoint counsel, which reasons are not preserved in the record. We therefore cannot say, upon the record now before us, whether there is merit in defendant's claim of Federal constitutional right; for the trial court may or may not have had ample reason, grounded in matter not apparent in the record, for not appointing counsel.

It is obvious that the writ of error *coram nobis* has no application. That must be addressed to the trial court, and if the trial court finds there was some mistake of fact not shown, which would have required a different judgment, such court may allow the writ, set aside the conviction, and supply the defect. It is apparent this writ could not apply here because all the facts appear to be known.

From a consideration of the scope of the several remedies

allowed in Illinois to a person convicted of crime, it is clear that the error claimed in the failure of the trial court to appoint counsel is not presented so as to be allowed upon writ of error, as it does not sufficiently appear from the record that any rights of the defendant to counsel were refused by the court. Nor did the defendant show by bill of exceptions that he made any proper application to the court requiring the appointment of counsel under the Illinois statute, so as to comply with due process.

To be precise, the position of the court is that the contention of the plaintiff in error cannot be allowed because the record he has tendered does not present a question for our consideration on writ of error.

SUPREME COURT OF THE UNITED STATES

No. ~~58~~.—October Term, ~~1947~~. 1948

Donald Loftus, Petitioner, *v.* People of the State of Illinois.	On Writ of Certiorari to the Supreme Court of the State of Illinois.

[June 14, 1948.]

Per Curiam.

By way of an original writ of error in the Supreme Court of Illinois, petitioner challenged the validity of four convictions in a circuit court of that State. The Illinois Supreme Court affirmed the judgments, 395 Ill. 479. We brought the case here, 333 U. S. —, because of a serious claim that petitioner was denied the assistance of counsel under circumstances which constitute a disregard of the safeguards to which he was entitled under the Due Process Clause of the Fourteenth Amendment.

The Illinois Supreme Court disposed of this claim on the basis of the requirements of Illinois law. If the Illinois decision was an adjudication of the rights to which the petitioner was entitled under the Due Process Clause, we would be constrained to hold that he had brought himself within our governing decisions. In his oral argument here, however, the Attorney General of the State insisted that the circumstances on which petitioner relies in claiming denial of a right under the United States Constitution were not properly before the Supreme Court of Illinois on the Illinois writ of error, but must be pursued in Illinois by *habeas corpus*. The Attorney General relies for his view of the local law upon two recent opinions of the Illinois Supreme Court, *People* v. *Wilson*, 399 Ill. 437, and *People* v. *Shoffner*, — Ill. — (not yet reported). Both these opinions certainly recognize that the right to counsel of indigent accused may, under rele-

vant circumstances, be part of the due process which the Fourteenth Amendment guarantees.

If, as a matter of local procedure, Illinois chooses to allow a federal right, such as the present record presents, to be vindicated by *habeas corpus* in its Illinois scope, but does not make available the Illinois writ of error, that is for Illinois to say and not for us to deny.

Even though our reading of the record and of Illinois law might give us a different understanding, we have had too great difficulty in ascertaining what is the appropriate Illinois procedure for raising claims of infringement of federal rights to reject the Attorney General's submission regarding Illinois procedural law. See, *e. g.*, *Marino* v. *Ragen*, 332 U. S. 561. If the Attorney General is correct and petitioner sought to raise even a valid federal claim by way of an unavailable Illinois remedy, we have of course a judgment that rests on a non-federal ground, calling for dismissal of our writ. In this state of uncertainty, we follow our precedent in *Herb* v. *Pitcairn*, 324 U. S. 117. See also *Phyle* v. *Duffy*, 334 U. S. —.

Accordingly, we shall continue this cause for an appropriate period to enable us to be advised without ambiguity whether the Illinois Supreme Court intended to rest the judgment herein on an adequate independent State ground or whether decision of the claim under the Fourteenth Amendment was necessary to the judgment rendered.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that the judgment should be reversed.